

***United States Court of Appeals  
for the Second Circuit***



**TRANSCRIPT**





B  
P/S

**Docket No. 74-2108**

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**IN THE  
United States Court of Appeals  
For the Second Circuit**

—  
UNITED STATES OF AMERICA,

*Appellee.*

—v.—

THOMAS M. FAHEY,

*Appellant.*

—  
**On Appeal From the Judgment of the United States District  
Court for the Northern District of New York**

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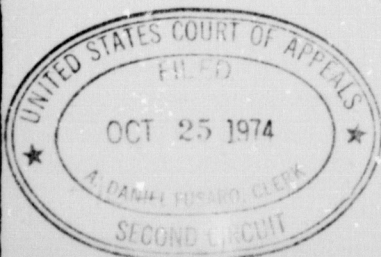
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LOVE, BALDUCCI & SCACCIA  
*Attorneys for Appellant*  
300 Wilson Building  
306 South Salina Street  
Syracuse, New York 13202

JAMES M. SULLIVAN, JR.  
United States Attorney  
Northern District of New York  
*Attorney for Appellee*  
Federal Building  
Syracuse, New York 13261

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- \*\* Indicates the papers submitted to U.S. Attorney on 5/30/74.

The physical form of the trial brief was 7 small, loose-leaf volumes (Groups A through H). It was organized in this manner to best gather and present the information we were submitting to the U.S. Attorney to support dismissal before trial. For ease of appellate reference, we have collected the material into one volume together with all other items of the record, exclusive of the transcripts (separate volume) and the trial exhibits (separate volume).





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PRE-TRIAL PROCEEDINGS, dated June 5, 1974.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

- - - - -  
-UNITED STATES OF AMERICA

-  
-against-  
-

-THOMAS FAHEY  
- - - - -

The following proceedings took place on the  
5th day of June 1974, at the United States District  
Court, Federal Building, Auburn, New York, before  
HONORABLE LLOYD F. MAC MAHON, United States District  
Judge.

APPEARANCES:

JAMES M. SULLIVAN, JR.  
United States Attorney  
EUGENE WELCH  
Assistant United States Attorney  
Of Counsel  
Attorney for Plaintiff  
Federal Building  
Syracuse, New York

DANTE M. SCACCIA, ESQ.  
Attorney for Defendant  
300 Wilson Building  
306 So. Saline Street  
Syracuse, New York



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

MR. SCACCIA: May it please the Court, my name is Dante Scaccia. I am defense counsel in United States Against Fahey, which is set down for trial after today, and I feel as an officer of the Court I should bring a matter to the Court's attention.

I have asked Mr. Welch to be present in the Court room when I make this application. I am sorry I didn't make it on papers.

THE COURT: Papers aren't necessary. Make the application.

MR. SCACCIA: If it please the Court, during the night and since yesterday I discovered that here we are on the eve of trial in United States against Fahey and that Grand Jury subpoenas have been issuing to a number of witnesses of which I can inform the Court certainly as to Nicholas Courtessis, since I have the subpoena in my hand, who happens to be very closely associated with me in the defense of this matter, as a matter of fact it was served in my office while we were working on the defense of this matter by special agents. More than that, during the night Your Honor I learned that other witnesses had been, who are to be witnesses for the trial and for the defense as well as the prosecution, have been subpoenaed to appear this morning at 10:00 before the Grand Jury.

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

Now I am aware that about two weeks ago when my wife took ill in New York City that our accountant Mr. Alan Boers of Ernst & Ernst had been subpoenaed to go with his books and records and working papers and appeared here.

A quick word about that, if I may, Judge. I had returned from New York about 1:00 in the afternoon and I don't have the date, counsel can give it to you because he issued these subpoenas, and I was informed that I should go to Ernst & Ernst because they had a matter of urgency to bring to my attention. And when I got there about 2:00 I learned that a Court subpoena had been served upon Mr. Boers theretofore over the weekend in my absence in New York, ordering him to appear personally together with his books, records and working papers for Thomas Fahey, the defendant here at a Court day here, and I looked at the subpoena and noted that the time to appear had already -- that 10:00 that morning it had expired, and he went on to tell me -- Mr. Boers happens to be an attorney from Ohio, also a CPA, that Michael Wilton the Special Agent had served the subpoena on him and had given him oral directions to appear at the United States Attorney's Office or at the Special Agent's IRS office, depending on what they could work out, but in any event Mr. Boers would not have to appear in Court



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

in Auburn.

With that I stated very frankly that we were working on very dangerous grounds, because it was a Court subpoena, that we should do three things, try to communicate with the Court, try to communicate with the Clerk's Office and try to communicate with the U. S. Attorney's Office. He did so on the telephone in my presence and he did reach the Clerk's Office in Utica, was unable to reach Your Honor or any Judge at that particular moment, and he left a call with Mr. Welch, I understand. I later talked to Mr. Welch and it was brought to Mrs. Welch's attention, and then Mr. Boers was immediately issued a Grand Jury subpoena, again by Michael Wilton, to appear that day or the day following that. Now with all of this it appears with a flurry of subpoenas on the date I thought was set for today, or on the eve of trial for tomorrow, that this is really improper conduct on the part of the U. S. Attorney, he is tying up all the defense witnesses, all the critical defense witnesses at a time when we are using them in the preparation of the trial. More than that I don't know the lawful purpose of such a Grand Jury subpoena with respect to Thomas Fahey. With the Court's permission I will hand up the subpoena served on Nicholas Courtessis who works with me, and in the umbrella of our protection

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

of working for the defense.

Mr. Boers tells me orally that all of the books, records and accounts for the defendant are still in the possession of the U. S. Attorney and have been since he was served with that subpoena, and more than that they have never been made available to me.

I am not urging that by way of delay, or I am not trying to obstruct, I am bringing to the attention of the Court what I consider a serious matter of prosecutor's conduct limited to the subpoenas, and the names beyond Courtessis are Dr. George Simpson is one of the parties, and I mentioned Mr. Boers who is the resident, at least was the resident partner of Ernst & Ernst, and Your Honor, there are others, and I am reporting this to the Court and I am asking for relief. I think the Court should direct the U. S. Attorney to bring an abrupt stop to the Grand Jury inquisition unless he can demonstrate there is a lawful purpose to be served.

MR. WELCH: If Your Honor please, the Grand Jury this morning has subpoenaed before it Mr. Nicholas Courtessis who is a close friend and associate of Mr. Thomas Fahey who at one point in 1971 made some statement to an Internal Revenue Agent in regard to matters relevant to the defendant's knowledge and intent, which are going to be specific elements we are going to have to



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

prove in tomorrow's trial.

My only intention was to subpoena Mr. Courtessis and put him on the witness stand, but in view of the fact we did have this Grand Jury available today, I thought because of his --it would be wiser for me to have some prior sworn testimony so I was not surprised by some change in his testimony from what he did tell the Internal Revenue Agent, if we did in fact call him to the witness stand.

The closeness of the relationship between Mr. Courtessis and Mr. Fahey is why I suspected that danger.

This morning is the first time I am advised that Mr. Courtessis is involved in the preparation of the defense for this case. Mr. Courtessis is a close friend and confidant of Mr. Fahey and has been with him in every stage of the matter, and that is the only reason I assumed he was with Mr. Scaccia during this investigation.

I am sure I can assure the Court that the questions put to Mr. Courtessis will have nothing to do with the defense of this case and will only have to do with Mr. Courtessis as to what was in Mr. Fahey's mind at the time of the questioning, during the '71 investigation and at the time when he alleged -- filed his alleged false and fraudulent income tax returns.

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

As to the other matters, Dr. George Simpson was subpoenaed as a trial witness and he is due here as a trial witness, he is not subpoenaed for the Grand Jury.

There is an accountant who was working for the firm of Ernst & Ernst who was subpoenaed before the Grand Jury much for the same reason as was Mr. Courtessis. That is our understanding of the situation at Ernst & Ernst, that Mr. Foody the accountant at Ernst & Ernst has become a close friend and associate of Mr. Fahey's. He too has made some oral statements to the Internal Revenue Service which unfortunately were never committed to sworn testimony, and I hoped to take advantage of the Grand Jury today to get his testimony in the form of sworn testimony.

As to the accountant Mr. Boers, yes, he was subpoenaed to the Grand Jury simply because when we asked him to produce the accountant's work papers and documents so we could prepare for trial, he took the position that he felt he could not do so without some subpoena or Court order, something to protect himself from any allegations by his accounting clients that he was participating in an unauthorized disclosure.

So that the United States served him with a subpoena to testify at trial and produced these documents, anticipating this would satisfy Mr. Boer's fears. At that point Mr. Boers called Mr. Fahey and Mr. Fahey called



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

Mr. Scaccia and Mr. Scaccia said you can't give it to the Internal Revenue Agent, what you have to do is comply with the subpoena, the United States served him with a Grand Jury subpoena, we got the records, we used them and we have returned them to Mr. Boers.

We are in no way tying up the records, they are in the possession of Ernst & Ernst, as far as I know they were returned to Ernst & Ernst within three or four days after we received them.

In the Grand Jury testimony of Mr. Boers I specifically asked him "have you ever refused access to these records to Mr. Scaccia?" and he said No, and in his -- in his sworn testimony, Your Honor.

We have no intention of tying up the defense witnesses or defense personnel and feel that it is perfectly proper to, and feel I would be remiss if I had the opportunity to get sworn testimony from these witnesses, not to put them into the Grand Jury.

THE COURT: The Grand Jury is here this morning?

MR. SCACCIA: Yes.

THE COURT: How long do you expect to have these witnesses before the Grand Jury?

MR. WELCH: I would say Mr. Courtessis should not take more than ten or fifteen minutes.

THE COURT: Are you willing to make him

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

available to Mr. Scaccia here in the Court House?

MR. WELCH: I don't understand.

THE COURT: Would you be willing to make these witnesses available to Mr. Scaccia?

MR. WELCH: They are available.

THE COURT: Here and now?

MR. WELCH: Yes, they are here available.

THE COURT: What about that, you say tying them up you can't talk to them.

MR. SCACCIA: That isn't the thrust of what I am trying to say. There is an additional matter I overlooked. When Mr. Courtessis was served he was originally -- they attempted to serve him with a Court subpoena right here last Friday when I was here on calendar call on this case, and I brought to Mr. Welch's attention this was improper.

THE COURT: What is improper about it?

MR. SCACCIA: Here they are serving him with both a Court Subpoena --

THE COURT: I understand, what is improper about it?

MR. SCACCIA: I suggested to him since the Court had indicated a return date on that day, the calendar date on the fifth, that he couldn't bring him before the Court on the fourth or any other date other



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

than the date set by the Court. I tried to remind him that subpoenas have got to be meaningful, they can't be an inquisition, they have to be returnable or if they are entitled to --

THE COURT: When was the calendar call?

MR. WELCH: On May 31st, last Friday.

THE COURT: Yes?

MR. WELCH: And we served the subpoena on Mr. Courtessis to appear on what we thought would be the start of this trial on June 3.

THE COURT: Yes?

MR. SCACCIA: But the real thrust of the matter, after this he then told me I could have a copy of Courtessis' statement. I went over to the office, his office, and he said he changed his mind. I think Courtessis is entitled to these statements which he first indicated to me I could have at 2:00 and twenty minutes after two I appeared at his office and he told me I couldn't have it.

THE COURT: What about that?

MR. WELCH: Yes, I did initially advise Mr. Scaccia he could have the statement, and upon giving it some thought and I recollected the close personal relationship between Mr. Fahey and Mr. Courtessis, Mr. Fahey since his investigation began has to my estimate changed his

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

story.

THE COURT: Why do you represent to counsel in one breath he can have something, then turn around and change your mind? Prosecutors can't do that.

MR. WELCH: It was a precipitous decision.

THE COURT: That is too bad, you are stuck with it, make it available, don't make precipitous decisions, prosecutors are public officers, they have a responsibility, Mr. Welch, I am sure you are aware of that, that is why you have to act cautiously and carefully. If you make a precipitous decision I am afraid you and the people of the United States have to suffer, so make it available to him.

MR. SCACCIA: Your Honor, there is one more important matter. During the entire course since January, right after the indictment, the Government and the defense and -- they entered into a voluntary agreement to make full disclosure by both sides, and we have delivered to the United States Attorney over that period of time literally a suitcase of material, copies of which we have here and we will be happy to have handed up here and marked for identification, including all the documentation in respect to our defense documents and letters from the accountants, and in the interest of full disclosure it wasn't until two minutes before Your Honor



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

stepped on this bench Friday, last Friday, that I learned that -- incidentally, that was all by the way of having the United States Attorney consider whether he would make a recommendation for authorization to dismiss this indictment. I will admit I could only submit the final memorandum to him, but all the documents had been delivered in January, the final memorandum, I prepared a memorandum of law and facts and that was delivered to him on Thursday afternoon because of my wife's critical illness in New York, that was the only reason for the delay at that time. In any event, two or three minutes before Your Honor ascended the bench on Friday, Mr. Welch announced that in effect all bets are off -- I am using that term -- he says he has had an emotional reaction and he is not going to consider it, and that we are going to trial, force us to trial on that basis after we have euchered over a six month period to disclose everything.

THE COURT: I don't know what Mr. Welch has to do with forcing you to trial, you are on trial because the Court said to try the case.

MR. SCACCIA: No question about that, the reason I bring it to the Court's attention is that I discussed with Mr. Welch Friday afternoon my willingness to have all the witnesses, including the defendant, appear before the Grand Jury in the interest of a full disclosure

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

of all the facts, many of which have never been touched on by the Investigation. I would let the Grand Jury hear all the evidence and will cooperate to the best of our ability to produce and furnish everything and we will waive immunity for the defendant and do whatever is reasonably necessary in that respect. Instead of a full exposition there has been a selective, I think, inquisition on the part of the U.S. Attorney, and I simply think it is wrong and I think it cries for justice in the face of the facts.

THE COURT: I don't get the thrust of it, you are saying that this is wrong, you are saying that it is improper, you are saying that it is unjust, it doesn't make it so, what is the legal basis for your position here?

MR. SCACCIA: As I understand it, Judge, and I am trying to recall, because this only came up during the night, it is the Lipschuts case in the Eastern District of New York in 1957, my recollection from when I was prosecuting, that the general effect is that it is improper for the U.S. Attorney on the eve of trial to use a Grand Jury for the purpose of in effect pre-trial discovery, and I think that is what it is.

THE COURT: Your objection is he is tying up witnesses. He already said they are available to you. Do



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

you still object?

MR. SCACCIA: I object because I think the purpose is wrong, he is using it as pre-trial discovery and I say that is improper.

THE COURT: What about that?

MR. WELCH: I think, Your Honor, that it is not pre-trial discovery, it is firming up the testimony of these witnesses.

THE COURT: What about that, after they are indicted can you use a Grand Jury to do what you failed to do when you should have done it?

MR. WELCH: I don't know, Your Honor.

THE COURT: Have you checked the law?

MR. WELCH: I have not checked the law.

THE COURT: Well, go check it.

MR. SCACCIA: If I may have ten minutes I can get that citation.

MR. WELCH: May we have the Court's permission to use the library?

THE COURT: Yes, I will wait here until you check it, which is what you should have done before you came here.

MR. SCACCIA: May I do my own independent research?

THE COURT: Let him do it.



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

(Thereupon a short recess was taken after which the hearing was resumed.)

MR. WELCH: I apologize for the delay. I think to shorten the matter I will simply withdraw the subpoena, I will not ask Mr. Courtessis to appear before the Grand Jury. I am sufficiently unclear on it. I have a prior oral statement from this witness and I will rely on that and anticipate the witness will testify truthfully and I will not press the issue, so that we don't build any potential reversible error in this trial.

THE COURT: You say that would be probably a legitimate reason to use the Grand Jury, to ascertain whether he is going to take the Fifth Amendment, is that your point?

MR. WELCH: Unfortunately, no, Your Honor, this witness --

MR. SCACCIA: I can assure the Court that is the case.

THE COURT: Or go back on his oral statement? Well, in calling him before the Grand Jury for that purpose, that limited purpose --

MR. WELCH: Yes, that is the limited purpose.

THE COURT: I would think that would be perfectly legitimate to use it if it doesn't in any way inconvenience you or tie up your witnesses or tie you up

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

in preparation of the trial. What is wrong with it? I would think it is to your advantage to find out what he is going to say with his statement.

MR. SCACCIA: In the Courtessis subpoena alone yesterday and the prosecutor promised he would give me a copy, I had no objection.

THE COURT: I want to know about now.

MR. SCACCIA: I have no objection to that, Judge, as long as any other witnesses -- that the Grand Jury is not being used by way of pre-trial discovery.

THE COURT: What about that?

MR. WELCH: The only other witness was this accountant who I felt had a close personal relationship and we wanted to put him before the Grand Jury for the purpose of confirming he will stick with the information he relayed to the Internal Revenue Agent. I feel less strongly about him and I am willing to withdraw the subpoena at this point, I am not going to press the issue.

THE COURT: You are the prosecutor.

MR. WELCH: As to the accountant, I would withdraw it if Your Honor's ruling is --

THE COURT: I am trying to avoid a ruling and have you work out a practical arrangement here if we can, which it seems to me that at this late stage in the game is the thing to do.



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

MR. SCACCIA: Given the Courtess's subpoena and the promise by the prosecutor it could be had, he could have a copy of his statement and --

THE COURT: What about that?

MR. WELCH: Yes, I was given several years ago, '71, I believe --

THE COURT: Don't you think it would be fair to give him a chance to take a look at it?

MR. WELCH: In the Grand Jury I had, Your Honor, I did not want him to have an opportunity to sit at great length with the defendant to manufacture excuses or reasons why he had said that before I get him committed on sworn testimony, that is the sole purpose of withdrawing my initial agreement to provide Mr. Scaccia with the statement.

THE COURT: Well, it is pretty unusual, Mr. Welch, the purpose of a Grand Jury is to inquire whether there is probable cause to believe the person has committed a crime. Once a Grand Jury does that and reaches a conclusion, it either indicts or fails to indict. A Grand Jury has indicted this defendant, what purpose are you using this Grand Jury for, what is your purpose? It is to find whether there is probable cause to believe a person has committed a crime, or ~~that~~ this defendant is committing another one, is there any purpose like that?



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

MR. WELCH: Your Honor, the purpose is simply to get this witness to commit himself to prior sworn testimony.

THE COURT: In other words it is to prepare for trial?

That is one way to look at it, that is not my way of looking at it but that is apparently the defense way of looking at it.

THE COURT: What else is it, you have no legitimate purpose, the only legitimate purpose is to inquire whether there is cause to believe a person committed a crime. Now are you going to --

MR. WELCH: I am going to withdraw it, Your Honor.

THE COURT: Withdraw both of them?

MR. WELCH: Yes, Your Honor.

THE COURT: All right, withdrawn.

MR. SCACCIA: I have one additional thing. In the interest of saving valuable time during the trial, I asked Mr. Welch to please in the interest of saving trial time and in the interest of justice to give me the Jencks statements in advance of trial.

THE COURT: Why can't you furnish them now?

MR. WELCH: He has about all the Jencks Act material, the crucial Jencks Act materials that I have

Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

opposed him on is the Special Agent's report, which as Your Honor knows contains conclusions, theory of argument, which is not a matter he is entitled to prior to that witness taking the witness stand.

THE COURT: I am aware of that, but I want to know why he can't have it, what good reason is there to the ends of moving the trial along without having to take -- how lengthy is this report?

MR. WELCH: I believe it is about 30 pages, Your Honor.

THE COURT: That is about a two hour delay that I would like to avoid.

MR. WELCH: Well, the difficulty is the entire report is not relevant to what the Agent is going to testify to.

THE COURT: That is usually the case, I don't know why they make reports that -- I don't know why they make reports at all, why if they make them they can't confine it to relevant matters. I am afraid these are things the rest of the Federal Government have to suffer.

MR. WELCH: It is 15 pages, Your Honor, of actual text.

THE COURT: Single spaced?

MR. WELCH: Yes, Your Honor.

THE COURT: Why can't you make it available?



Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

So it is immaterial, how does that hurt you?

MR. WELCH: Well, Your Honor, it also simply lays open to the defense at this point all the Government's potential arguments as to how the Jury should construe various items of fact that we put in, that kind of information is in there, the report is not limited to --

THE COURT: You feel it would seriously prejudice your case?

MR. WELCH: Yes, Your Honor.

THE COURT: All right, we will stay with the Jencks Act. I would ask you though to make a photostatic report and make it available to the defendant as soon as you feel that you can do so without prejudicing your case. That may be during the course of the witnesses' testimony.

MR. WELCH: Very well, Your Honor.

THE COURT: Or over a lunch hour so we can try to eliminate this delay as much as possible. This is a built in delay of trial.

MR. SCACCIA: I recognize that. We furnished the Government with everything, including our memorandum of law, memorandum of facts, all of our documentation and made available any records or documentation we have in our possession or available to us.



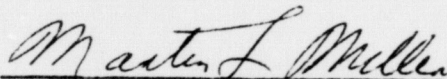
Proceedings on Defense Motion (on the day before the trial) to quash subpoenas issued by the Government for appearances before the Grand Jury of witnesses already under subpoena to testify at the trial the following day.

THE COURT: The Agent's report can only be secondary, anyway, it has to be based on primary evidence. I don't know why the Agent would even take the stand, I don't see any direct evidence he can give.

(Thereupon the foregoing hearing was concluded.)

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This is to certify that the foregoing is a true and accurate transcript of the proceedings heard at the time and date noted in the heading hereof.



MARTIN L. MILLER  
Official Reporter  
United States District Court  
Northern District of New York



## TRIAL PROCEEDINGS.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
-UNITED STATES OF AMERICA

-  
-against-  
-

-THOMAS M. FAHEY  
-----

Criminal No. 73-CR-181

The following proceedings took place at the  
United States District Court, Federal Building, Auburn,  
New York commencing on the 6th day of June 1974 before  
Honorable Lloyd F. MacMahon, United States District Judge,  
and a jury.

## A P P E A R A N C E S:

HONORABLE JAMES M. SULLIVAN, JR.  
United States Attorney  
EUGENE WELCH  
Assistant United States Attorney  
Attorneys for United States of America  
Federal Building  
Syracuse, New York

LOVE, BALDUCCI & SCACCIA, ESQS.  
DANTE M. SCACCIA, ESQ.  
Of Counsel  
Attorneys for Defendant  
Wilson Building  
Syracuse, New York



## Trial Proceedings.

MR. SCACCIA: If it please the Court, before the Court calls the case may I have the Court's permission to have sitting with me in addition to the defendant, a paraprofessional who has been working with me --

THE COURT: Does the paraprofessional, will you use him as a witness in any way, will you?

MR. SCACCIA: Yes, Your Honor. The Government has subpoenaed him as a witness. It is the same Mr. Courtassis that we discussed in Court yesterday. I understand from the Government they do not intend to question him in any respect in the --

THE COURT: Ordinarily witnesses shouldn't sit in the Court Room unless there is some special reason for that.

MR. SCACCIA: I understand. For our purposes he serves no other function than the Special Agent.

THE COURT: Did you have any objection to his remaining?

MR. WELCH: None to the accountant, Your Honor, none to Mr. Courtassis either.

THE COURT: All right.

MR. WELCH: In that regard, the Government has in addition to Mr. Wilton, the Special Agent in the case, a Revenue Agent who at one point after hearing

Opening Statement by Government.

the testimony will present a computation of those figures.

THE COURT: You mean just do the arithmetic?

MR. SCACCIA: I have no objection.

THE COURT: All right.

THE CLERK: United States of America against Thomas M. Fahey, Criminal 73-CR-181.

MR. WELCH: The Government is ready.

MR. SCACCIA: The defendant is ready, Your Honor.

(A panel of 12 jurors and four alternates were duly drawn and sworn.

THE COURT: All right.

MR. WELCH: If it please the Court, good morning ladies and gentlemen. My name is Gene Welch, or Eugene Welch. I am an Assistant United States Attorney and my job here is going to be to put questions to the witnesses on the witness stand to elicit from them the testimony that you need to hear to decide the questions in this trial, that is, the guilt or innocence of Mr. Fahey as the charge is against him.

But right now I have this opportunity to briefly explain to you what it is we intend to prove.

Mr. Fahey is charged in two counts of what is



## Opening Statement by Government.

known as attempted income tax evasion, the first count for 1966 and the second count for 1967. It is charged that he attempted to evade a large part of the tax he owed by filing a false and fraudulent income tax return. So to convict the man of that charge you are going to have to find that there was in fact an additional tax due and owing for each one of those years, and that Mr. Fahey attempted to evade or defeat the payment of that tax, and that he did so willfully.

Now looking at each count, and as to 1966, we expect to prove that he filed an individual income tax for 1966, filed it on April 16, 1968, a year late, and at that return he reported a taxable income of \$3,742. and he reported a tax due of \$419. But we will prove to you that in addition to that \$3,742 Mr. Fahey received another \$14,994.00 in 1966 that he did not report on that income tax return.

As to Count II for 1967, that is a joint return filed by Mr. Fahey with his wife. That was filed on April 15, 1968. In that return he and his wife reported a joint taxable income of \$7,707, and he reported a tax due of \$1,324.00. But much the same as 1966, we will prove to you that in addition to

## Opening Statement by Government.

the income that he put on that return, Mr. Fahey received another \$11,666.22 in 1967 that he did not report on that return.

We expect we will prove to you that Mr. Fahey received those sums, that \$14,000 and \$11,000 as salary from a partnership, a partnership which ran a place called Castle Rest Nursing Home.

Mr. Fahey was paid \$14,000 in 1966 and \$11,000 in 1967 to act as administrator for that partnership, but he didn't report these amounts on his income tax return.

We expect we will prove to you that he knew that he was supposed to report these amounts on his income tax return but did not, and that is an important question for you to decide.

At one point at the end of the trial we will call to the witness stand a Revenue Agent who will as you heard the Judge mention earlier just do the arithmetic for you so that you should not get terribly bothered if you have forgotten figures as you hear them, but in addition at the end of the trial the Revenue Agent will compute the figures for you.

The question for you to decide is whether or not Mr. Fahey did fail to report something that he



## Opening Statement by Government.

should have reported on his income tax report, and did he do so so that he didn't have to pay the tax on that return, and that is what we expect we are going to be able to prove to you.

The issues are not very complicated. The figures are not complicated. Just concern yourselves with 1966 and 1967. He filed those returns April 15, 1968, both returns for both years, and did not report the income from the partnership. The question is why not. We are going to argue to you from the evidence that he did not because he wanted to beat the tax for those years, 1966 and 1967.

Basically that is the case. It is not a difficult case. This is going to be my last chance to talk with you, but the witnesses will testify and in a sense they will be talking to you and telling you what they witnessed, and I am going to ask you to please pay close attention to what they say and listen to the Judge's instructions very carefully at the end of the trial and we will have an opportunity to sum up what we expect you to conclude from those exhibits or evidence. But as you listen to all of the evidence, there is only one kind of a verdict and that is a just verdict and that is all we ask.

Opening Statement by Defendant.

Thank you.

THE COURT: Mr. Scaccia?

MR. SCACCIA: If it please the Court, Counsel, ladies and gentlemen of the jury. I will try to stand here that -- so that counsel can hear me, too. My name is Dante Scaccia. I am a lawyer in Syracuse with the law firm of Love, Balducci & Scaccia. Our offices are in Syracuse and I represent Thomas M. Fahey, who stood earlier during the course of the Judge's questioning of you folks to be prospective jurors. We expect to show on behalf of the defense that Thomas Fahey at no time and in no way deliberately or intentionally attempted to defraud or attempted to evade the payment of taxes to the United States. We expect to show by our proof, simply stated, there was absolutely no question here as to any criminal intent on the part of Thomas Fahey. We expect to show through the proof, and I trust at the appropriate time as the Court mentioned earlier when instructions of law are given to you by His Honor, that you will have the rules of law laid out before you by His Honor against which you will lay and apply all the rules of law the Court gives you to the evidence from that witness chair and from the documents that the Court admits in evidence.



## Opening Statement by Defendant.

In short what I am saying to you in simple terms is that we expect to prove to you that the evidence -- based upon the evidence, all of the evidence in the case, and I too join with counsel in asking you to pay very strict close attention to all of the evidence, both for the prosecution and later for the defense at the appropriate time in the trial, based on all that evidence and upon the rules of law there is absolutely no criminal intent in this case, and I can tell you forthrightfully as the record and evidence will show we already told the government, that Thomas Fahey was one of at varying times, but essentially four partners, the numbers varied from time to time as the proof will show, but he was one of four partners, he was the administrator, the other partners had other functions, there was a medical director, there was I suppose what these men will call in their own testimony as I recall a money man partner, Thomas Fahey and -- Thomas Fahey was the Administrator that was trained and didn't have the money, then there is a lawyer who I suppose was the lawyer function of that partnership, in short that is what the proof will show. That that partnership was formed, it was formed to rehabilitate the old Syracuse General Hospital and convert it once

## Opening Statement by Defendant.

the Community General Hospital was built into a nursing home, and that immediately the other partners, particularly a Walter Walker McKinney and his lawyer and the lawyer for the partnership, a man named William Murray chose and selected the accounting firm of Ernst & Ernst which we hope to show by the evidence is a very well national accounting firm, and that they did the accounting work from 1966 and through the years.

The proof will show that just before Ernst & Ernst were hired there was a short period I believe in 1965 when a Sheldon Kall, a CPA had to do with it, but the important years, the indictment years '66 and '67, during those years the accounting firm of Ernst & Ernst did all of the accounting work, including audits and this sort of thing for this enterprise. There came a time each and every year when they issued specific written instructions in the form of a signed letter by the partner in charge, a man named Allan Boers -- you don't have to remember this, but I will tell you what we expect to prove, in those letters each of the years specific directions were given to the partners. These partnership returns were prepared by Ernst & Ernst and a letter of transmittal with



## Opening Statement by Defendant.

instructions to each of the partners, Mr. Fahey and the other partners accompanied each of the partnership returns sent by Ernst & Ernst, and specific directions were given to each of the partners, and we say the proof will show that Thomas Fahey followed those instructions, those written instructions to the letter, and that had he done so he had a perfect right to do so and the letters were designed for the purpose of issuing instructions to each of the partners with respect to handling the matters contained in the partnership return as to how and which should be transferred to each individual tax return, the individual partner, and that in short Thomas Fahey followed the letter of those instructions, and as far as we know the other partners did likewise, that is up to the proof to say, that I can't speak to, but that is a perfect legal defense.

We will wait for the Court to give you the appropriate rules of law with respect to that matter, and that more than that the proof will show that this was a case where a controversy was started some time in 1965 extending into 1966 and increasing in 1967 and '68 leading to major law suits in 1969, that is how serious the disputes became, and it went

Richard E. Pelland, Jr. for Government, Direct.

through arbitration and we will tell you about that, but there are many conflicting claims by each of the partners in the partnership with respect to their rights, so all of this was done in this context and we will leave that to the proof. We are outlining what the proof will be so you can have at least a framework to work from.

What I say to you is not evidence but it is my duty to tell you the broad outline and framework and that is what the case is about.

In short, at best this is a civil tax audit which does not belong in a Federal criminal trial because there are other avenues for them to collect. I am confident that when you hear all the evidence and deliberate you will come out with a finding of not guilty.

THE COURT: All right, Mr. Welch.

MR. WELCH: United States calls Mr. Richard Pelland.

RICHARD E. PELLAND, Jr.

called as a witness on behalf of the Government being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. WELCH:

Q Mr. Pelland, will you tell the ladies and gentlemen



Richard E. Pelland, Jr. for Government, Direct.

how you are employed?

A I am employed by the United States Treasury,  
Internal Revenue Service Department at the Andover  
Service Center, Andover, Massachusetts.

Q For how long have you been so employed?

A 17 years.

Q What is your present capacity?

A I am a Supervisor in the Accounting Department.

Q And how long have you been a Supervisor of the  
Accounting Department?

A Approximately three years.

Q And as such, the Supervising of the Accounting Department, what are some of your duties?

THE COURT: Is he here for the purpose of introducing the return?

MR. WELCH: Yes.

THE COURT: Get right to it. Who cares what his duties are.

MR. WELCH: May I approach the witness?

THE COURT: Yes.

BY MR. WELCH:

Q Mr. Pelland, if you would please, I have handed you a group of previously marked exhibits. I direct your attention to the first one, Exhibit No. 1 for identification. Tell the ladies and gentlemen what

Richard E. Pelland, Jr. for Government, Direct.  
that is please?

A Exhibit No. 1 is a United States individual income tax return, Form 1040, for the calendar year 1966. The taxpayer is Thomas M. Fahey, 415 Stratford Street, Syracuse, New York.

Q And was that return filed at the Andover Service Center?

A Yes, sir, it was.

Q From that exhibit can you tell me when it was filed?

THE COURT: Doesn't it show? Isn't there a stamp on it?

THE WITNESS: Yes, there is.

MR. SCACCIA: We will stipulate to the returns.

THE COURT: To the returns?

MR. SCACCIA: Yes, as to the filing of both returns.

THE COURT: All right, received in evidence. You are excused. Next witness.

(Government's Exhibits 1 and 2 for identification marked in evidence.)

MR. WELCH: If Your Honor please, I have other exhibits I sought to introduce.

THE COURT: All right, put the others in. Show them to counsel. I thought you would have done that ahead of time.



Discussion.

MR. SCACCIA: I asked for an opportuntio do --  
to do so.

(Discussion held off the record, between  
counsel.)

MR. SCACCIA: I have no objection.

MR. WELCH: May we approach the bench?

THE COURT: Yes.

(The following proceedings took place at the  
bench out of the hearing of the jury.)

THE COURT: You have no objection to the com-  
petency of any of them?

MR. SCACCIA: That's correct.

THE COURT: The only thing you can do is  
establish the competency, that's all you can do  
through this witness. You have no objection to the  
competency?

MR. SCACCIA: I don't.

THE COURT: At the appropriate time you can  
go over them and I will hear your objections as to  
materiality.

MR. SCACCIA: I would suggest at the first  
recess counsel and I get together and prepare a  
list of the stipulations. I will be very happy to  
cooperate. I have been urging this --

THE COURT: I certainly wish you would do it.

Discussion.

This is usually done in pretrial.

MR. SCACCIA: It saves so much time.

THE COURT: This is incredible that you don't do it up here. I can't believe it. Pull the guy all the way from Andover, Massachusetts to identify an income tax return when there is no dispute. As a taxpayer it hurts me.

MR. WELCH: If Your Honor please, I had other reasons for calling this witness, but if your Honor rules --

THE COURT: If you want to --

MR. WELCH: I was going to ask him about the specific items so the jury will have them.

THE COURT: They are shown on the return.

MR. WELCH: That's correct.

THE COURT: You don't need it.

MR. SCACCIA: The Internal Revenue Agent can point those things out.

MR. WELCH: I am offering the 1968 individual and partnership return.

THE COURT: You have no objection to the competency?

MR. SCACCIA: No.

THE COURT: You have no objection to competency of 3 or 5?



## Discussion.

MR. SCACCIA: That's right.

THE COURT: All right.

MR. WELCH: These two are eight and nine.

MR. SCACCIA: These are not the indictment years.

THE COURT: I am sorry?

MR. SCACCIA: That was my objection. The indictment years I have no objection to.

THE COURT: What are the exhibit numbers of the indictment years?

MR. WELCH: 1 and 2.

MR. SCACCIA: I have no objection.

THE COURT: 1 and 2 are received in evidence. I understand you have no objection to competency of 3. How many others are there, 3 through 7, 3 through 9, no objection as to competency?

MR. SCACCIA: No, sir.

THE COURT: All right.

MR. WELCH: I am offering those at this time.

THE COURT: What is your objection?

MR. SCACCIA: My objection is to -- I have no objection except 8 and 9. My objection to 8 and 9 is that they are post-indictment, they are not competent, they are not germane or relevant to the issues here. I can understand if the prosecutor

## Discussion.

is trying to show prior years as a pattern, but for the years following there is no possible connection for them in this case.

MR. WELCH: They are material in that Mr. Scaccia has indicated in his opening that they pertain to Mr. Fahey receiving advice from the accountant. The Government will show the same thing when Mr. Fahey did not follow the advice of the counsel in '68.

THE COURT: These are the post indictment years?

MR. WELCH: Correct, Your Honor.

THE COURT: I think they are admissible as a similar act. Overruled.

(Government's Exhibits 1 through 9 marked in evidence.)

MR. WELCH: I have nothing further.

(The following proceedings took place in the presence and hearing of the jury.)

THE COURT: This bench conference was just to save a half a day of unnecessary testimony. I don't want you to jump to the wrong conclusions. We are not trying to keep something from you at these bench conferences, they are usually done in the interest of expediting the trial and moving it along.



Discussion.

(Witness excused.)

MR. WELCH: If Your Honor please, United States calls Mr. Allen --

MR. SCACCIA: May we advance to the bench?

THE COURT: Yes.

(The following proceedings took place at the bench out of the hearing of the jury.)

MR. SCACCIA: Again in the interest of saving time, I am perfectly willing to stipulate right from the beginning --

THE COURT: Stipulate to what?

MR. WELCH: I would be happy to. My understanding, Mr. Scaccia, that he would not stipulate --

THE COURT: I don't care about all the past, are you now willing to take a stipulation?

MR. WELCH: Yes, Your Honor, except the witness has the original of the exhibit and I will have to get that.

THE COURT: You can stipulate that. Stipulate to put in a copy.

MR. SCACCIA: I will stipulate to the copy.

MR. WELCH: The only thing is these have markings on them from the Grand Jury.

THE COURT: Stipulate these can go in evidence, Exhibits 10 and 11?

Discussion.

MR. SCACCIA: Yes.

MR. WELCH: All right. I might raise the next problem, Your Honor. Mr. James Culotti of Culotti Construction Company called to testify this morning concerning payments to Mr. Fahey in '66 and '67 which the Government contends are closely related to the payments that he did not report, and that they were part payment of \$20,000 to the partnership. It is important to put this witness on the witness stand and elicit this testimony from him. I am advised he is in the middle of a strike with iron workers and with -- and was tied up in a meeting this morning negotiating settlement of that strike. At the time I prepared this case I anticipated consumming t' e morning --

THE COURT: I am not going to wait for witnesses.

MR. SCACCIA: I am willing to stipulate Culotti's testimony in every respect.

THE COURT: Stipulate the testimony?

MR. SCACCIA: Tell me the amounts and dates and I will stipulate.

THE COURT: All right, take the stipulation.

MR. WELCH: Well, may we take a moment to work this out, Your Honor.



Laura E. Post for Government, Direct.

THE COURT: Do it out of order at another time during the recess. Work out your stipulations. Call your next witness.

(The following proceedings took place in the hearing of the jury.)

MR. WELCH: The Government calls Laura Post.

LAURA E. POST

called as a witness on behalf of the Government being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. WELCH:

(Government's Exhibits 10 and 11 marked in evidence.)

Q Mrs. Post, keeping your voice up good and loud so the ladies and gentlemen of the jury can hear you, can you tell the ladies and gentlemen of the jury how you are employed?

A I am employed as a tax auditor, Internal Service.

Q And where are you so employed?

A Hunter Plaza Building, Syracuse, New York.

Q In that capacity did you have occasion to conduct a tax audit of one Thomas Fahey?

A I did, the '67.

Q And when did you do that '67 audit?

Laura E. Post for Government, Direct.

A In 1969.

Q Do you remember the specific date in '69?

A According to my records it was on June 6 -- or June 2, I am sorry.

Q Well, when you conducted this audit then can you tell the ladies and gentlemen whether or not you made any inquiries of Mr. Fahey concerning his reported income on the 1967 return?

A On all audits we are to ask --

THE COURT: Please.

BY MR. WELCH:

Q I am asking you specifically what you did with Mr. Fahey?

THE COURT: What what you do with all audits, we couldn't be less concerned, all we want to know is what you did in this case.

THE WITNESS: Yes, I asked him if all income was reported.

MR. SCACCIA: May we have a date?

THE COURT: She said June 2 or 6.

THE WITNESS: It was the 2nd of June.

BY MR. WELCH:

Q Mrs. Post, you were beginning to respond to the question as to the questions you put to Mr. Fahey, would you continue?



Laura E. Post for Government, Direct.

A I asked him if all income had been reported, and according to my records he said yes.

Q Mr. Fahey reported to you that income -- all income was reported?

A Yes.

MR. WELCH: I have no further questions.  
Thank you.

THE COURT: Cross examine.

MR. WELCH: If Your Honor please, Mr. Scaccia has received the materials of Mrs. Post sometime ago --

THE COURT: Please address the Court.

MR. SCACCIA: I am sorry, Your Honor. I was wondering whether there was any Jenck's material. She is unknown to me.

MR. WELCH: Just her work notes that Mr. Scaccia received some time ago.

MR. SCACCIA: That is not so.

THE COURT: Let's mark it, hand it to Mr. Scaccia.

MR. WELCH: If Your Honor, if your Honor please, for the record the only statements by Mrs. Post are attached to the return, and we have provided Mr. Scaccia with a copy. He doesn't recollect it.

THE COURT: All right.

Laura E. Post for Government, Cross.

MR. SCACCIA: I am ready to proceed.

THE COURT: Mark it 3500 material, Mr. Evans.

(Document marked Exhibit 3500 for identification.)

CROSS EXAMINATION BY MR. SCACCIA:

Q Mrs. Post, can you tell the Court and Jury just where it was that you had the conversation with Mr. Fahey?

A I had the conversation at Room 500 at the Internal Revenue Service.

Q That is at the office of IRS in Syracuse?

A Yes.

Q At the time do I assume correctly that some Supervisor or Superior of yours handed or directed Mr. Fahey's returns to you for the audit section or audit attention?

A No, the Clerk's bring them in.

Q And when that was done did you have in your possession all the material that IRS had for the particular year that you had under consideration for Mr. Fahey?

A Yes.

Q And among that materials did you have the partnership returns filed by the Castle Rest Nursing Home naming among other partners Mr. Fahey, Mr. Metzger, Dr. George Simpson and Walker McKinney?

A No.



Laura E. Post for Government, Cross.

Q Did there come a time when you became aware of the filing of the partnership return for the year 1966 or '67?

A No, it was just last week when I knew this was coming up.

Q Do I understand correctly it was only within the last week that you first became aware of the existence of the filing of the 1966 or 1967 partnership return for the Castle Rest Nursing Home?

A Yes.

Q In any event when you so learned did you learn that it contained -- excuse me, when did you learn that that was filed with the Government, with IRS, Mrs. Post?

A The partnership?

Q The partnership return.

A I wasn't aware when that was filed.

Q Mrs. Post, I hand you with the Court's permission, I hand you Government Exhibit 6 which is now in evidence and ask you to take a quick look at that and tell us if that is the specific partnership return that you are now telling us you learned about sometime a week or so ago?

A Yes.

Q And does it contain a notation or a marking on the

Laura E. Post for Government, Cross.

face of that return as to when it was received?

MR. WELCH: If Your Honor please, I note the objection that the evidence speaks for itself.

THE COURT: Sometimes the markings are not all that clear, they are stamped put on by Internal Revenue.

BY MR. SCACCIA:

Q If it has any marks.

A It has a stamp received April 8, 1968.

Q 1968?

A Yes.

Q So do I take it fairly that that return was in the possession and filed with the Internal Revenue Service fairly that that return was in the possession and filed with the Internal Revenue Service since April 8?

MR. WELCH: Objection to the question on the grounds it is irrelevant.

THE COURT: Sustained.

BY MR. SCACCIA:

Q In any event you first became aware of it in what manner a week ago?

A A week ago -

MR. WELCH: Objection, Your Honor.

THE COURT: Sustained.



Laura E. Post for Government, Cross.

BY MR. SCACCIA:

Q Did you have occasion to -- well, tell us how long you talked to Mr. Fahey on the occasion you did on June 6 or June 2?

A I think according to my records the first time it was three quarters of an hour, the first time he came in and then he mailed the other information in and it was probably another half hour all together.

Q And during the course of those two occasions of the total contact that you had with Mr. Fahey did you at any time ask Mr. Fahey as to whether he was a member of a partnership?

A No, I asked him if all income had been reported.

MR. SCACCIA: I move that be stricken as unresponsive.

THE COURT: Yes, strike it out.

BY MR. SCACCIA:

Q I asked you simply, Mrs. Post, did you at any time ask Mr. Fahey whether he had any interest at all in any partnership?

A No.

Q Did you ask Mr. Fahey as to any of the W-2's that were filed along with the 1967 return that you had under examination?

A I don't understand what you mean.

Laura E. Post for Government, Cross.

Q I will see if I can make it a little simpler. As part of the exhibit, no secret about it, I hand you Exhibit 2 which is the 1967 return, I take it that is the return that you were auditing in June of 1969, is that correct?

A Yes.

Q And I ask you now as to whether you had occasion to ask Mr. Fahey at the time you had contact with him the times you just described to us as to whether there were any W-2's other than those that are still presently attached to the 1967 return?

A No, all I asked was --

Q (Interrupting) That's enough. Did you ask Mr. Fahey or did you touch upon in the course of the conversation as to whether he had any other employment other than as indicated in the W-2's attached to the face of the return?

A I didn't ask him employment, I asked income.

Q Did you ask him whether he received any salaries from any sources other than as indicated or attached to the 1967 return?

A The salaries would be included.

Q Did you ask him --

THE COURT: Please don't argue with counsel, just answer his question. Mr. Welch is the



Laura E. Post for Government, Cross.

Government lawyer, he will take care of the arguments, you just answer the question. Now let's try again. All right. Mr. Scaccia.

MR. SCACCIA: Thank you, Your Honor, did you Mrs. Post, ask Mr. Fahey at any time you had a contact with him, ask him whether he had any other salaries other than mentioned either on the face of the return or inside the return or attached to the return?

A No.

MR. SCACCIA: No further questions.

MR. WELCH: No further questions.

THE COURT: You are excused. Next witness.

MR. WELCH: The United States calls Mr. James Culotti.

MR. SCACCIA: May we advance to the bench?

THE COURT: Yes.

(The following proceedings took place at the bench out of the hearing of the Jury.)

MR. SCACCIA: I again am willing to stipulate as to anything with respect to Culotti. If counsel will tell me --

THE COURT: What is the testimony going to be?

MR. WELCH: His testimony, Your Honor, will be that he paid Mr. Fahey in '67 and '66 pursuant to

James E. Culotti for Government, Direct.

the agreement with the Walker M. Kinney Associates, that he was to pay him from the contract with McKinney Associates --

THE COURT: I didn't ask you why it was relevant, I asked you to tell me what he was going to say.

MR. WELCH: He is going to explain why he paid Mr. Fahey this salary. He took him off the payroll in '66 and put him back again in '67.

THE COURT: I think perhaps the Jury should hear this.

(The following proceedings took place in the presence and hearing of the Jury.)

JAMES E. CULOTTI

called as a witness in behalf of the Government being duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. WELCH:

Q Mr. Culotti, will you tell the ladies and gentlemen of the Jury how you are employed?

A Pardon?

Q How are you employed?

A I am a General Contractor.

Q And where are you a General Contractor?

A Nedrow, New York.



James E. Culotti for Government, Direct.

Q And is that a suburb of Syracuse, New York?

A Yes, it is.

Q What is the nature of the contracting work you do?

A Commercial, industrial buildings.

Q Did your corporation -- are you incorporated?

A Right.

Q What is the name of your corporation?

A R. A. Culotti Construction Company, Inc.

Q Did the corporation ever have occasion to do work for the Castle Rest Nursing Home and Walker McKinney Associates?

A Yes.

Q And what was it that the Corporation did for Walker McKinney Associates?

A Remodeled the place which is known as the Castle Rest which used to be the Syracuse City Hospital.

Q Remodeled the building?

A Right.

Q And when did you do this Mr. Culotti?

A Started approximately in '66.

THE COURT: When?

THE WITNESS: I don't know the date.

BY MR. WELCH: When was it completed?

A About a year later.

Q In '67?

James E. Culotti for Government, Direct.

A Yes.

Q During the course of that time did you have occasion to employ a Mr. Thomas Fahey?

A Yes.

Q And when did you employ Mr. Fahey?

A He started with us December 18, 1964.

Q Was he employed in the year '66 and '67?

A Yes.

MR. SCACCIA: If it please the Court, I don't want to be technical, if he has a mass of documents I think I am going to object to his reading from a mass of documents.

THE COURT: Yes, sustained. Let's take the documents out of his hands.

BY MR. WELCH:

Q Now Mr. Culotti, do you recollect whether or not Mr. Fahey was employed by Culotti Construction in '66 and '67?

A Yes, according to the record he was.

Q Well, do you directly recall that yourself?

A Yes.

Q Do you recall in what capacity Mr. Fahey was employed in '66 and '67?

A Not really, my father handled that and he has since passed away. I don't know what his capacity was, as



James E. Culotti for Government, Direct.

a consultant or what, really.

Q Were you involved in the operations of the construction company at that time?

A I was, when my father died I took over the company.

Q When did your father die?

A In '66.

Q When you took over was Mr. Fahey working at Culotti Construction on the premises?

A On the site, right.

Q On the Construction site of the nursing home?

A Yes.

Q Mr. Culotti, do you recall how much the construction company paid Mr. Fahey in '66?

A I don't know, it is on the record.

Q Let me ask a question, do you recall yourself?

A No.

Q All right, if I show you a document would it help refresh your recollection?

A Yes, it would.

MR. WELCH: If I may approach the witness.

THE COURT: You don't need to keep asking that, you have constant permission for all exhibits.

BY MR. WELCH:

Q Mr. Culotti, I just handed you Exhibits numbers 12 and 13 for identification, would you tell the ladies

James E. Culotti for Government, Direct.

and gentlemen of the jury what those are please?

A '66 first?

Q Exhibit 12 please.

A Says \$10,600.

Q Well what is the piece of paper in your hand?

THE COURT: Is it a W-2 form?

THE WITNESS: Wage statement, W-2.

BY MR. WELCH:

Q Is that the copy retained in your records?

A Yes.

Q And for what tax payer?

A For the Federal.

Q What is the name of the person?

A Thomas M. Fahey.

Q And for what year is that?

A This is 1966.

MR. WELCH: If Your Honor please I would move  
in admission Exhibit No. 12.

THE COURT: Do you have another one there?

MR. WELCH: Yes.

THE COURT: Let's do it wholesale. Are those  
records kept in the regular course of business?

THE WITNESS: Yes.

THE COURT: As part of your business you keep  
these records, do you?



James E. Culotti for Government, Direct.

THE WITNESS: That's right.

THE COURT: Offer it.

MR. WELCH: Your Honor, the United States offers Exhibits No. 12 and 13 into evidence.

MR. SCACCIA: May I see what 13 is? I have no objection.

THE COURT: Received.

(Government's Exhibits 12 and 13 marked in evidence.)

BY MR. WELCH:

Q Mr. Culotti, I hand you Exhibit No. 14 for identification, could you tell the ladies and gentlemen of the jury what that document is?

A It is an agreement between the Walker McKinney Associates and Culotti Construction Company.

Q What date is that agreement?

A February 9, 1965.

Q And who signed that agreement?

A Walker McKinney and R. A. Culotti Construction.

Q Did you bring that document with you today?

A Yes.

Q From your files of Culotti Construction Company?

A Yes.

Q If I may direct your attention to paragraph one of that agreement, Mr. Culotti, what does that paragraph

James E. Culotti for Government, Direct.  
concern --

THE COURT: Sustained.

MR. WELCH: If Your Honor please, I will  
move Exhibit No. 14 into evidence.

MR. SCACCIA: May I have an opportunity to  
examine him first, Your Honor, to examine the  
exhibit first?

THE COURT: Yes.

MR. SCACCIA: If it please the Court, I am  
going to object.

THE COURT: What ground?

MR. SCACCIA: It is incompetent. I read the  
last paragraph of the document, it indicates --  
(Document handed to Court.)

MR. SCACCIA: The very last paragraph indicates  
it is not a contract, Your Honor, and not binding  
on this defendant in this law suit.

THE COURT: Sustained. We will take a short  
recess, particularly to cool the Court room down a  
little bit.

(Thereupon a short recess was taken which the  
hearing was resumed.)

BY MR. SCACCIA:

Q Mr. Culotti, you brought with you this morning some  
records, is that correct?



James E. Culotti for Government, Direct.

A Right.

Q I have just handed you Exhibit No. 15 marked for identification, will you tell the ladies and gentlemen what exhibit 15 is?

A This is our payroll record to Thomas Fahey, his weekly salary we paid him.

Q And for what years does Exhibit 15 reflect?

A That is for '66, from January '66 to September '66.

Q And does that reflect the kind of payments that he received and on the dates he received them?

A Yes.

Q I hand you Exhibit 16 Mr. Culotti and ask you to tell the ladies and gentlemen what that is?

A These are the cancelled checks from January '66 to September '66 paid to Tom Fahey.

Q Are those the cancelled checks of the income you were paying Mr. Fahey?

A Yes.

Q I hand you Exhibit 17 Mr. Culotti and ask you if you can identify Exhibit 17?

A This is again our payroll record for Thomas Fahey, this is from January '67 to May '67.

Q And finally Mr. Culotti I hand you Exhibit 18 marked for identification, can you tell the ladies and gentlemen what that is?

James E. Culotti for Government, Direct.

A These are cancelled checks from January of '67 to May of '67 paid to Tom Fahey.

MR. WELCH: The United States offers these Exhibits 15 through 18 into evidence.

MR. SCACCIA: May I have a quick look at them? I am sure I can stipulate them. If the United States Attorney will state that this is the same information contained in the W-2's previously received I won't bother examining them.

MR. WELCH: As to the totals it is, it just specifies exactly when paid. We intend to ask the witness further questions in that regard.

MR. SCACCIA: I have no objection.

THE COURT: Received.

(Government's Exhibits 15 through 18 marked in evidence.)

BY MR. WELCH:

Q Now Mr. Culotti you testified earlier there was a contractual agreement between Walker McKinney Associates and your corporation in regard to the renovation of the Castle Rest Nursing Home, to your recollection was there any statement that the corporation was to pay Mr. Fahey?

A Yes.

MR. SCACCIA: I don't know of any contract now



James E. Culotti for Government, Direct.

in evidence.

THE COURT: Sustained.

BY MR. WELCH:

Q Mr. Culotti, handing you again Exhibit 15 that has been received into evidence what is the last payment recorded on Exhibit 15?

A The last payment, September 7, 1966.

Q All right. Now from Exhibit 15 what was the total amount that you had paid Mr. Fahey up until September 7, 1966?

A For the 1964 --

Q From the entire years he was on your salary.

A \$26,800.

Q \$26,800?

A Right.

Q Now I am handing you Exhibit 17 Mr. Culotti, when did the payments to Mr. Fahey begin as reflected in Exhibit 17?

A They started January 18, 1967.

Q Now if Mr. Fahey was receiving any other payment from between September '67, September 1966 and January 1967 would they be reflected on those two exhibits?

A Yes, if he was receiving payments, yes.

Q So it would be fair to say he did not receive any payments from Culotti Construction during that

James E. Culotti for Government, Direct.

period?

A That's right.

Q Was Mr. Fahey still on the site of the Castle --

A (Interrupting) '67?

Q During the period from September '66 to January '67?

A Yes.

Q Was Mr. Fahey performing any different functions from what he was performing prior to September '66?

MR. SCACCIA: Objection, we don't know what the prior functions were as against what the other functions were.

THE COURT: Sustained.

BY MR. WELCH:

Q All right, Mr. Culotti, what were the functions being performed by Mr. Fahey pursuant to this -- or during the year 1966?

A 1966?

Q Yes, the years in which you paid him and referred to these exhibits.

MR. SCACCIA: I object unless this witness says he knows, Judge.

THE WITNESS: Pardon?

THE COURT: Yes, did you observe what he was doing during that period?



James E. Culotti for Government, Direct.

THE WITNESS: In '66, no, I didn't, not the first part of '66.

BY MR. WELCH:

Q At any time in '66 did you witness what this --

A (Interrupting) Not in '66, I didn't witness it, no.

Q At no time in '66?

A No.

MR. WELCH: I have no further questions of this witness, Your Honor.

MR. SCACCIA: I have no questions of this witness.

THE COURT: You are excused. Next witness.

MR. WELCH: If Your Honor please, United States calls Mr. Walker McKinney.

If Your Honor please I have been advised that Mr. McKinney my next witness is not here.

THE COURT: Get the next one. Did he know there was a trial this morning?

MR. WELCH: Yes, I anticipated taking more time with the initial witnesses.

THE COURT: Have your witnesses here. I told you that for three years. Have them in the Court room so we can roll.

MR. WELCH: If Your Honor please, then the

Nicholas A. Courtessis for Government, Direct.  
United States at this time can call Mr. Nicholas  
A. Courtessis.

NICHOLAS A. COURTESSIS

called as a witness on behalf of the Government  
being first duly sworn was examined and testified  
as follows:

DIRECT EXAMINATION BY MR. WELCH:

Q Mr. Courtessis, would you tell the ladies and  
gentlemen of the Jury how you have -- how you are  
employed?

A How I am employed now?

Q Yes.

A I am self-employed in the form of a corporation,  
Jefferson Franklin Corporation.

Q What are the functions of the Jefferson Franklin  
Corporation?

A Well, I specialize in consulting services.

Q Consulting services in regard to what, Mr. Courtessis?

A Public Relations and Management and Communications.

Q And for how long have you been doing that?

A I established my corporation at the end of 1960.

Q Now in the course of your -- well, do you know if  
the defendant -- do you know the defendant Mr.  
Thomas Fahey?

A Yes, I do.



Nicholas A. Courtessis for Government, Direct.

Q What is your relationship to the defendant Mr. Fahey?

A My present relationship with Mr. Fahey is a business relationship in which I am employed as a consultant for the Castle Rest Nursing Home.

Q For how long have you been so employed by the Castle Rest Home?

A Under the present structure since Mr. Fahey purchased the Nursing Home, since October of 1972.

Q Prior to October of 1972 did you do any work for the Castle Rest Nursing Home?

A Yes, I did.

Q When was the first you began working for Castle Rest Nursing Home.

A The first was in the beginning of 1967, this was prior to the opening of the nursing home.

Q Did the Jefferson Franklin Corporation do work prior to that year?

A No.

Q Are you socially acquainted with Mr. Fahey?

A To an extent as a consequence of the business relationship.

Q Well then, directing your attention to 1971, were you involved in business with Mr. Fahey during 1971?

Nicholas A. Courtessis for Government, Direct.

A In 1971 I was not directly employed by Mr. Fahey, because that was the period during which time there was both arbitration and court litigation between Mr. Fahey and Mr. McKinney over distribution of partnership profits.

Q Well, did you know Mr. Fahey during those years or during '71?

A Yes.

Q Did you have occasion to have conversations with him during '71?

A Yes.

Q Did you have occasion to discuss with Mr. Fahey an internal Revenue Service investigation?

A Only to the extent that I knew that there was some kind of an investigation going on.

Q Did you discuss this with Mr. Fahey?

A Yes.

Q Did Mr. Fahey tell you what his problem with the Internal Revenue Service was?

A Not specifically, no.

Q Did Mr. Fahey discuss with you -- did Mr. Fahey tell you about his income from the Castle Rest Nursing Home?

A Well, I think you better refine that question because I don't know exactly what you mean.



Nicholas A. Courtessis for Government, Direct.

Q In 1971 in the context of the discussions with you concerning this problem with Internal Revenue Service, did he discuss his income from the Castle Rest Nursing Home?

A No.

Q Did there come a time when you were interviewed by the Internal Revenue Agents?

A Yes.

Q When was that?

A That was on or about -- can I refresh my memory from the memorandum?

Q Do you know?

A I couldn't recall without refreshing my memory.

Q Do you recall who interviewed you?

A Yes.

Q Who?

A Mr. Michael Wilton.

Q When Mr. Wilton interviewed you Mr. Courtessis did he make notes of your conversation?

A Not in my presence.

MR. SCACCIA: May we have a time fixed as to when this took place please?

BY MR. WELCH:

Q If I might approach the witness and show him a document to refresh his recollection as to the

Nicholas A. Courtessis for Government, Direct.

time which he says he cannot recall. Mr. Courtessis I have just handed you a document, could you examine that and read it to yourself carefully and see if that refreshes your recollection?

A Yes, sir, this is the same document I received yesterday.

Q You have seen it prior to today?

A Yes, your office delivered it to Mr. Scaccia.

Q Now Mr. Courtessis, could you tell the ladies and gentlemen when you were interviewed by Mr. Wilton?

A According to this document, and I have no reason to dispute it, it was August 6, 1971.

Q Now then if you would take the occasion to read the rest of the document to yourself please.

A I have read it.

Q Now Mr. Courtessis, I would like to redirect your attention to your conversations with Mr. Thomas Fahey concerning his problem with the Internal Revenue Service, do you recall Mr. Fahey telling you anything about his income from the Castle Rest Nursing Home in regard to his problems with the Internal Revenue Service?

A No, he told me that he was having a problem with the Internal Revenue Service, but he did not specifically discuss with me the nature of the specific problem.



Nicholas A. Courtessis for Government, Cross.

Q Did you tell Mr. Wilton at that August 6, 1971 interview anything different from what you have just testified to now?

A No, I did not, I told him a lot more, it was a lot different from what is on that piece of paper.

MR. WELCH: I have no further questions.

Thank you, Your Honor.

CROSS EXAMINATION BY MR. SCACCIA:

Q I will ask you, Mr. Courtessis to tell the court and jury where you and Mr. Wilton were when first contact was made as best you know and what happened?

A Mr. Wilton called me the day before that meeting occurred.

MR. WELCH: If I might object, Your Honor, to this testimony, it is completely beyond the scope of the direct testimony, Your Honor.

THE COURT: Overruled.

BY MR. SCACCIA:

Q Please go on.

A Mr. Wilton called me the day before that meeting and he advised me that I was to have my books of my corporation looked into. I asked him the purpose of this inquiry and it was related to a charge that there was a possibility of kickback between myself and Mr. Fahey. Now that, to put it as mildly as I

Nicholas A. Courtessis for Government, Cross.  
can, tended to send me into orbit, because a year before, and I am almost 99% sure --

MR. WELCH: If Your Honor please, I object.

THE COURT: Sustained.

THE WITNESS: Well, I explained to Mr. Wilton that my books had already been audited once a year before that during the course of the arbitration under the same kind of accusations as the attorney for the partner that Mr. Fahey was fighting in the litigation. They examined the books, found absolutely no evidence of any kickbacks or any other wrongdoing. Mr. Wilton then came over and I was particularly disturbed about that because here now a year later an IRS Agent was coming in on the same false type of examination --

MR. WELCH: Objection, Your Honor.

BY MR. SCACCIA:

Q Is that what you stated Mr. Courtessis to Mr. Wilton at that time?

A Yes, in no uncertain terms, and I further stated that I personally objected to the whole idea of the Internal Revenue Service being used as a tool in a private war between two parties.

THE COURT: Just so I understand, are you telling us that Agent Wilton wasn't concerned at



Nicholas A. Courtessis for Government, Cross.  
all about the income of this defendant?

THE WITNESS: No, sir, that is not what he came over for, and frankly I was outraged at that point, I really was and I let him know about it on the phone and I let him know about it when he got over there.

BY MR. SCACCIA:

Q What if anything happened after you made that statement?

A He came over, examined the books.

Q Where did he come?

A He then came to my office.

Q Where is that?

A That was 316 South Warren Street.

Q In Syracuse?

A Yes.

Q Did he come alone?

A Yes.

Q What took place then?

A What took place then is he spent about an hour there and he examined my books for 1967, 1966, 1968 '69 to whatever extent he thought was appropriate. I said "You are free to look at them, they have been looked at before, you can look at them again." I also offered him my personal checks to look at to

Nicholas A. Courtessis for Government, Cross.

cross check against the corporate accounts. He looked at all those and he said after his examination "I find nothing here whatsoever," close the books and that ended the investigation of the books for that purpose.

Q And did anything further or additional take place at that time and place with Mr. Wilton and in his presence?

A Yes.

Q Tell us what happened?

A I did ask him, because I did not know the specifics of the investigation that was going on, and I asked him what was going on in terms of the investigation of Mr. Fahey, again as a consequence of my own irritation of the whole thing. To my recollection he did advise me that he could not comment on the situation specifically because he was investigating it.

THE COURT: Are you telling us that he didn't even raise the subject of Mr. Fahey, that you did?

THE WITNESS: I raised the subject of Mr. Fahey.

BY MR. SCACCIA:

Q On that point and up to that time had Mr. Wilton identified himself as a Special Agent of the Internal Revenue charge with the collection and investigation of criminal offenses of the tax laws?



Nicholas A. Courtessis for Government, Cross.

A Not to my recollection.

Q And at any time in your contact with him up to that time did he produce his credentials and give you the Miranda warnings required, including the right to counsel?

THE COURT: Sustained.

BY MR. SCACCIA:

Q I withdraw that. Please tell us what if anything else happened from that point on.

THE COURT: Anything pertaining to Fahey, he is all we are concerned with.

THE WITNESS: I offered my own personal observations that from my experience --

THE COURT: Sustained. Strike it out.

BY MR. SCACCIA:

Q Did Mr. Wolfson ask any further questions pertaining to Mr. Fahey at any time during the balance of that conversation?

A No sir, whatever was discussed was on my volition.

MR. SCACCIA: That's all I have. No further questions.

THE COURT: You are excused. Next witness.

MR. WELCH: Your Honor, I am advised that the witnesses that I had subpoenaed here for this morning I had Mr. McKinney due here this morning I believe

## Discussion.

at 10:00 at our last discussion, he is not here, and I have no explanation for it. All the other witnesses were not expected until this afternoon.

THE COURT: Put somebody on out of order.

MR. WELCH: I have no other witnesses at this point, Your Honor.

THE COURT: You are telling me you have no other witnesses coming today?

MR. WELCH: Not until this afternoon.

THE COURT: What time?

MR. WELCH: Well, some were told to be here at 1:00 and some at 3:00.

THE COURT: All right, we will recess now until 1:30. Get your witnesses here if you have to send out the National Guard to get them here.

(Thereupon a luncheon recess was taken.)

(The following proceedings took place in the Court Room out of the presence of the jury.)

THE COURT: We have got a problem with one of the alternate jurors. Alternate Juror No. 2 Peter Kuhn has indicated that his father is in critical condition in the hospital and also that his father's company called him and said that he has to get some papers for his father's signature with regard to retirement or his death benefits from the corporation



Walker McKinney for Government, Direct.  
from Columbia Rope will be affected, and Mr. Kuhn  
is quite concerned about that fact because he doesn't  
know how long his father is going to live. The  
hospital didn't give his father that much longer to  
live.

MR. SCACCIA: I have no objection.

MR. WELCH: I have no objection to his being  
excused.

THE COURT: All right, we will excuse him.

All right, bring in the jury.

(The following proceedings took place in the  
presence of the jury.)

MR. WELCH: If Your Honor please, the Govern-  
ment calls Mr. Walker McKinney.

WALKER McKINNEY

called as a witness on behalf of the Government  
being first duly sworn was examined and testified  
as follows:

DIRECT EXAMINATION BY MR. WELCH:

Q Mr. McKinney, for the record is your name Walker  
or Walter?

A Walker.

Q Mr. McKinney how are you employed presently?

A I am a real estate developed and investor.

Q And how were you employed during the period 1964

Walker McKinney for Government, Direct.

to 1969?

A The same.

Q All right. As part of your employment did you have occasion to do business with Mr. Thomas Fahey during that period 1964 to 1969?

A Yes.

Q Would you explain to the ladies and gentlemen of the jury in what capacity you did business with Mr. Fahey?

A I was introduced to Mr. Fahey in late '64 and the proposal was made that I investigate --

MR. SCACCIA: I want to object on -- unless we have the date of the conversation and the persons present Your Honor.

BY MR. WELCH:

Q Well, Mr. McKinney, let me ask you this, what was the nature of the business you were conducting with Mr. Fahey?

A We were going to start a nursing home in Syracuse.

Q And --

THE COURT: Fix the time.

THE WITNESS: December 1964. We were going to purchase the former hospital on Castle Street and convert it into a nursing home.

BY MR. WELCH:



Walker McKinney for Government, Direct.

Q When you say "we" to whom are you referring?

A Thomas Fahey, Theodore Metzger, George Simpson and myself.

Q And ultimately did you enter into this venture with Mr. Fahey and Mr. Simpson and Mr. Metzger?

A Yes.

Q Mr. McKinney, I am handing you what has been marked for identification as Government Exhibit 19, would you tell the ladies and gentlemen what that document is?

A This is the partnership agreement which we were operating.

Q Directing your attention to the last page of that document, first of all is that an original or photocopy?

A This is a photocopy.

Q But on that last page do there appear to be signatures?

A Yes.

Q And is your signature affixed to that?

A Yes.

Q Is Mr. Fahey's signature affixed to that?

A Yes.

Q And what is the date of that agreement?

A November 16, 1965.

Walker McKinney for Government, Direct.

Q And what is it entitled?

A Walker McKinney Associates, articles of partnership.

MR. WELCH: Your Honor, at this time I move the admission of Government Exhibit 19.

MR. SCACCIA: I have no objection.

THE COURT: Received.

(Government's Exhibit 19 marked in evidence.)

BY MR. WELCH:

Q Now pursuant to that November 16, 1965 articles of partnership, was to -- was Mr. Fahey to receive a salary from the nursing home?

MR. SCACCIA: I object to it, the instrument speaks for itself.

THE COURT: Sustained.

BY MR. WELCH:

Q Mr. McKinney, in Government's Exhibit No. 19, paragraph 7.1, there is a statement concerning Mr. Fahey's salary of \$20,000, to your knowledge in the year 1966 was this agreement in effect as to a salary to be paid to Mr. Fahey, it was -- was it still in effect?

A Yes.

MR. SCACCIA: I object to the form of the question and characterization and move to strike it out.



Walker McKinney for Government, Direct.

THE COURT: Sustained. Strike it out.

MR. WELCH: I didn't hear part of it.

THE COURT: What it came to is not competent.

BY MR. WELCH:

Q For how long is this agreement effective?

A This agreement was effective through 1969, into 1969, let me say.

MR. SCACCIA: I want to object to that, that is expressing a legal opinion. I move it be stricken, Your Honor.

THE COURT: Overruled. He was a partner, he certainly should know.

BY MR. WELCH:

Q Mr. McKinney, what was the partnership relationship under these articles, would it be fair to call you a senior partner under this agreement?

THE COURT: Sustained.

BY MR. WELCH:

Q If you could describe the relative positions of the partnership, of the partners involved in this undertaking?

MR. SCACCIA: Objection, Your Honor, incompetent, irrelevant, immaterial, calls for a characterization. The instrument is the best evidence.

THE COURT: I don't know what is in the

Walker McKinney for Government, Direct.  
agreement, I haven't seen it. Are the relative  
positions stated?

MR. WELCH: Yes, it is.

THE COURT: You can read it. The document is  
in evidence. Do we have to have the witness read  
it to us?

BY MR. WELCH:

Q All right. Now Mr. McKinney, did Mr. Fahey receive  
the full \$20,000 he was guaranteed under this agree-  
ment in 1966?

A Yes.

Q And did he receive that in full payment from the  
Walker McKinney partnership?

A No.

Q From where did he receive it?

MR. SCACCIA: Excuse me, in that case I move  
his previous answer be stricken. He is now saying --

THE COURT: I know what he said. What is your  
objection, not what he is saying.

MR. SCACCIA: My objection is it is incompetent,  
Your Honor. He just testified at -- a moment ago  
as to --

THE COURT: He may have, you didn't object to  
it. Overruled.

BY MR. WELCH:



Walker McKinney for Government, Direct.

Q From what source did Mr. Fahey receive the \$20,000 set forth in this agreement that was received in the years '66 and '67?

THE COURT: Sustained.

BY MR. WELCH:

Q Do you know from what source Mr. Fahey received --

THE COURT: Sustained -- overruled, go ahead.

THE WITNESS: Yes, I know.

BY MR. WELCH:

Q From what source did he receive the \$20,000?

A A portion of this was received from Walker McKinney Associates, the partnership, the remainder was received from Culotti Construction Company who was building the nursing home.

Q At any time since November 16, 1965 have you entered into any other formalized or informal agreement with Mr. Fahey with regard to the \$20,000 salary or any income he was to receive from the partnership?

A Yes.

Q And when was that?

A Verbally, and I can't give you the exact date, his income was increased to \$24,000 a year and it was later rescinded.

MR. SCACCIA: I am going to object, it is

Walker McKinney for Government, Direct.

verbal, we ought to have the time, place and circumstances.

BY MR. WELCH:

Q Was it prior or during or after 1966 and '67?

A It was after that period.

MR. SCACCIA: In that case I move it be stricken, Your Honor.

THE COURT: After the tax years?

THE WITNESS: Yes, it was after those years.

THE COURT: Sustained. Strike it out.

BY MR. WELCH:

Q During the year 1966 and '67 does this constitute the only income from the partnership?

A Yes.

Q What was Mr. Fahey's -- do you know what Mr. Fahey actually did to earn the \$20,000?

A Yes.

Q What did he actually do?

A He was going through a great deal of work getting bureaucratic approvals, I say bureaucratic, many different organizations had to give us approval to allow us to build a nursing home, to convert the hospital into a nursing, we had to get a mortgage and this particular mortgage was given by six parties, six participating banks, it required a



Walker McKinney for Government, Cross.

lot of coordination among those banks to get that mortgage, those were the major things. He was also preparing the architectural plans for the conversion, working with the builder and architect.

Q Did he do this during this '66 and '67?

A Yes.

MR. WELCH: I have no further questions.

Thank you.

CROSS EXAMINATION BY MR. SCACCIA:

Q Mr. McKinney, did I understand you correctly that there were no other agreements with respect to payments to partners in this period up to at least through '66 and '67 other than the November '65 agreement?

A Yes.

Q Isn't it correct sir that on or about September of 1967 an agreement --

MR. WELCH: Objection, Your Honor.

THE COURT: I haven't heard the question yet.

Finish your question.

BY MR. SCACCIA:

Q Isn't it correct, Mr. McKinney, that on or about September of 1967 that the partners entered into written agreements with respect to payments of draws and advances to the partners, including yourself

Walker McKinney for Government, Cross.

MR. WELCH: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: No, I don't believe so.

BY MR. SCACCIA:

Q And more specifically -- by the way, Mr. McKinney, do you have any of your records with respect to this partnership with you here today?

A I have a few photocopies, nothing that isn't here though.

Q Would you check through whatever records you do have and see if you can produce the original of the letter signed and issued by you on the letterhead of the McKinney Corporation dated September 6?

THE COURT: Let's not take time to do that, ask him if he knows of the original of a paper that you have in your hand.

(A document marked defendant's Exhibit A for identification.)

BY MR. SCACCIA:

Q Mr. McKinney, I hand you Defendant's Exhibit A for identification dated September 6, 1967 and ask you to look at it and tell us if you know what that is?

THE COURT: Do you recognize that?

THE WITNESS: Yes, I know what this is.

BY MR. SCACCIA:



Walker McKinney for Government, Cross.

Q Will you tell the Court and Jury what that is?

A This letter involves my employment by the partnership as an employee.

Q As an employee?

A Yes.

Q And does it also set forth an amount in terms of dollars that is to be paid to you?

A Yes.

MR. WELCH: If Your Honor please, I object to this whole line of questioning, it is irrelevant.

THE COURT: Sustained.

MR. SCACCIA: Exception.

BY MR. SCACCIA:

Q Mr. McKinney, do you say that there were no other writings with respect to the partnership agreement beyond November 1965?

A No.

Q Will you tell the Court what if any writings were in existence or came in existence with respect to the partnership following November 1965?

MR. WELCH: Objection, Your Honor, it is irrelevant and outside the scope of the direct testimony.

THE COURT: Overruled.

THE WITNESS: Well, your question -- there was

Walker McKinney for Government, Cross.

enormous correspondence involving the partnership, there was none involving the partners relationship with each other in the partnership agreement, I don't know if there was anything germane to this hearing, but there was correspondence of all types, this action for an example.

Q Isn't it correct, Mr. McKinney, during one of the indictment years, 1967 to be specific, not only was Thomas Fahey to receive money from the partnership, but also you, Mr. McKinney, were to receive money from the partnership, and Mr. George Simpson the third partner was to receive money from the partnership.

THE COURT: You mean apart from the distributions of partnership profits?

MR. SCACCIA: Yes, apart from the distribution of the partnership profits.

THE WITNESS: That is true.

MR. WELCH: I object.

THE COURT: Overruled.

BY MR. SCACCIA:

Q And isn't it correct, Mr. McKinney, that you were to receive \$12,000 a year payable in installments of \$1,000?

A Yes.



Walker McKinney for Government, Cross.

Q And that was to reimburse you in your capacity as financial director?

A Yes.

Q And isn't it correct that Dr. George Simpson was to be paid \$2,400 a year payable in monthly installments of \$200 in his capacity as Medical Director?

MR. WELCH: Objection, Your Honor, to the form of the question. If the witness knows.

THE COURT: Do you know?

THE WITNESS: Yes, it is true.

BY MR. SCACCIA:

Q And with respect to the payments, you did receive those payments pursuant to that agreement?

A Yes.

Q And with respect to the payments that you receive from the partnership, can you tell this Court and Jury as to whether you reported those amounts in your personal income tax return as income?

MR. WELCH: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Can you tell the Court and Jury as to whether there was discussion by and between you and the other partners, namely Fahey, Metzger and Simpson together with your attorney Mr. William Murray with respect as

Walker McKinney for Government, Cross.

to how those payments were to be handled on the books and records of the partnership?

MR. WELCH: Objection, Your Honor.

THE COURT: Fix the time and place.

BY MR. SCACCIA:

Q In 1967, sir.

THE COURT: No, and the parties present.

BY MR. SCACCIA:

Q Just prior to September 6th, September 7, 1967 there was present, wasn't there present, you, Mr. Fahey, Dr. Simpson and Mr. Murray your lawyer together with Mr. William Metzger the fourth partner, at which time you had a discussion concerning the manner and method in which the payments to the partners were to be handled on the book and records of the company?

A Yes.

Q Isn't it correct it was agreed at that time by and between the four of you partners and your lawyer that the payments to the partners were to be treated as advances and draws against your partnership interest, isn't that correct, sir?

A Yes.

MR. SCACCIA: No further questions.

THE COURT: You are excused. Thank you.

MR. WELCH: If Your Honor please, the United



Lawrence E. Krentkowski for Government, Direct.  
States calls Lawrence Krentkowski.

LAWRENCE E. KRENTKOWSKI

called as a witness on behalf of the Government  
being first duly sworn was examined and testified  
as follows:

DIRECT EXAMINATION BY MR. WELCH:

Q Mr. Krentkowski, would you tell the ladies and gentlemen of the Jury how you are employed?

A I am a Vice President of the Marine Midland Bank in the Branch Loan Administration Section.

Q And did you appear here today pursuant to a subpoena?

A Yes, I did.

Q Did you bring with you documents to Court?

A Yes, sir.

Q I would like to direct your attention to Government's Exhibit for identification Numbers 20, 21, 22 and 23, can you tell the ladies and gentlemen of the Jury what those are?

A These are personal financial statements of Thomas M. Fahey on certain specified dates, and the assets and liabilities.

Q Let me direct your attention to number 20, if you will go through each individually, Exhibit 20 reflects his financial condition, the financial

Lawrence E. Krentkowski for Government, Direct.

condition of Mr. Fahey as of what date?

A August 3, 1965.

Q And it is signed by whom?

A Thomas M. Fahey.

Q And what date is it signed?

A 3rd of August, it says here, there is no year.

Q All right. Directing your attention to number 21, Exhibit 21 reflects the financial condition of Mr. Thomas Fahey what date?

A August 15, 1966.

Q And as of what date is that signed?

A August 15, 1966, Thomas M. Fahey.

Q Exhibit 22, the financial condition of Mr. Fahey as of what date?

A January 1, 1968.

Q And is it signed?

A Yes, sir, first day of January 1968.

Q By whom?

A Thomas M. Fahey.

Q And Exhibit 23, I believe it is.

A Financial condition as of November 1, 1968, signed the first day of November 1968 by Thomas M. Fahey.

MR. WELCH: Your Honor, the United States offers them in evidence.

MR. SCACCIA: If I may have a preliminary



Lawrence E. Krentkowski for Government,  
Voir Dire.

question.

VOIR DIRE EXAMINATION BY MR. SCACCIA:

Q Mr. Krontkowski, can you tell the Court and Jury as to whether there was any provision in any of the forms, Government's Exhibits 20 through 23 inclusive, making provision for the reporting of advances by partners, in short, did you have a line for that item?

A It appears not, it is just salaries, fees and commissions and other income.

Q Isn't it correct with respect to all of the forms 20 through 23 for identification that there is no provision for -- I said advances, draws as well as advances, in short I am extending my question to advances or draws.

A There is no provision for that at all on the form, just other fees and salaries.

Q Can you tell the Court what your normal procedure was in the normal discharge of your regular duties with respect to interrogating or taking a financial statement from a partner, as to where and how you would enter the item for advances and draws?

A I would not personally take a statement from a partner, I would hand it to him and he would fill it out. He could put the income from the partnership

Lawrence E. Krentkowski for Government,  
Voir Dire.

in that salary, he could, whether he would or not depends on him. It could go in other income, but he could put it in that particular section.

MR. SCACCIA: I have no further questions.

THE COURT: They are received.

(Government's Exhibits 20 through 23 marked in evidence.)

MR. WELCH: No further questions of this witness.

THE COURT: You are excused. Next witness.

MR. WELCH: If Your Honor please, defense counsel and the United States have agreed to stipulate that in the year 1966 Mr. Thomas M. Fahey did receive the sum of \$14,994 in payment from the Walker McKinney Associates, and in 1967 Mr. Thomas M. Fahey did receive payment of \$11,666.22 payment from the Castle Rest Nursing Home during 1967.

MR. SCACCIA: So stipulated, Your Honor.

MR. WELCH: If Your Honor please, the next witness is Mr. Gerald Cullen.

May we approach the bench?

THE COURT: Yes.

(THE Following proceedings took place at the bench out of the hearing of the jury.)

MR. WELCH: Your Honor please, Mr. Cullen, my



Gerald M. Cullem for Government, Direct.

sole request is to advise the Court that Mr. Cullen is the Agent to do the arithmetic. I have not had an opportunity to show Mr. Scaccia the chart to see if he has an objection, but it might save time if we could --

MR. SCACCIA: I am not going to slow up the trial, if I can have it I can make an objection at a later time.

THE COURT: Let's take it subject to connection if they have some bum arithmetic in there.

MR. SCACCIA: Sure.

(The following proceedings took place in the presence of the jury.)

GERALD M. CULLEM

called as a witness on behalf of the Government being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. WELCH:

MR. WELCH: If Your Honor please, may I tender to the Court schedules from which Mr. Cullem will be testifying?

THE COURT: Yes, surely.

MR. WELCH: I would also ask leave of the Court to provide the jury with the schedules as well.

Gerald M. Cullem for Government, Direct.

THE COURT: All right.

BY MR. WELCH:

Q Mr. Cullem, would you tell the ladies and gentlemen how you are employed?

A I am employed by the United States Treasury Department, Internal Revenue Service as a Revenue Agent.

Q And as a Revenue Agent what are your duties?

A To examine books and records of various business, individual businesses, partnership, corporations. In the examination of the books and records it is for comparison to their tax returns to see if there are any omissions or corrections to those tax returns based --

THE COURT: What difference does it make what he does, he is doing just arithmetic.

BY MR. WELCH:

Q Mr. Cullem, is it true you sat through this trial so far today?

A Yes.

Q And heard the evidence presented?

A Yes.

Q Prior to your taking the witness stand, and in fact prior to today did you have an opportunity to review that evidence and calculate the tax due and owing



Gerald M. Cullem for Government, Direct.

on those items of evidence?

A Yes.

Q All right. If I could ask you then to please direct your attention -- did you bring your calculations with you?

A Yes.

Q I direct your attention to the calculations for the year 1966, if you would please explain to the jury the arithmetic if you will on the 1966 calculations?

A We started with the figure "taxable income per return," that is the figure that the tax is based on, and we start with the figure per the return, add to that figure the sums that have been stipulated here which I have shown as unreported gross salary of \$14,994. We deduct --

MR. SCACCIA: I object to that characterization, it hasn't been justified by the evidence, no evidence at all up to this stage that defines and characterizes and lays a proper foundation for that kind of characterization. I understand this witness is simply doing the arithmetic.

THE COURT: In short, you are objecting to the label on there?

MR. SCACCIA: Yes.

THE COURT: Let me try it this way. These are

Gerald M. Cullem for Government, Direct.

the figures and labels which the Government contend are supported by the evidence. Whether or not they are is something you have to decide. Does that take care of it?

MR. SCACCIA: Yes, Your Honor. Thank you.

BY MR. FELCH:

Q All right, now Mr. Cullem you had gotten to the second line in the calculations, if you would continue please?

A All right. There was a figure of a withholding that was paid over to New York State which was not deducted on the tax return, which figure we allow as a deduction against the above figure, and that figure being \$490.50. The remainder being a net increase to income during 1966 of \$14,503.50. We added it to the taxable income per return of \$3,742 and that gives us a corrected taxable income figure of \$18,245.50.

On that figure we now compute a corrected computation of income tax. The corrected taxable income for the period as stated above was \$18,245.50. The tax according to the tax rate schedule for head of the household, which the taxpayer claimed on his original return, the tax on \$18,000 equals \$4500. The amount that exceeded



Gerald M. Cullem for Government, Direct.

\$18,000, that being \$245.50, that is taxed at 36% and in dollars that is \$88.38 or a corrected tax liability of \$4588.38.

The taxpayer had shown on his tax return Federal Income Tax withheld from R. A. Culotti Construction Company of \$1,689. There were amounts that were withheld from Walker McKinney Associates that were turned over to the Government during the course of 1966 amounting to \$1,595. This claim or this credit was not previously shown on the tax return. We give him credit for that since the money was turned over to the Government.

The sub-total of those two figures of monies paid to the Federal Government was \$3,284. The amount refunded to the taxpayer on the filing of his '66 return was \$1,077.42. The net tax paid by the taxpayer applicable to 1966 was \$2,206.58. The net additional tax, we subtract this from the corrected tax liability and it gives us a net tax of \$2,381.80.

Q Now if you would please direct your attention to the year 1967?

A In 1967 again we start with the taxable income per return, and that being \$7,707. Again the unreported gross salary figure of \$11,666.22 we added to the

Gerald M. Cullem for Government, Cross.  
taxable income per return and that gives us  
\$19,373.22. The tax on \$16,000 as we go down,  
moving to the computation of income tax based on  
the corrected taxable income, the tax on \$16,000 --  
the taxpayer now files a joint return, the tax was  
\$3,260. The excess of the \$3,373.22 is taxed at  
28% and it is \$944.50 which gives us a correct tax  
liability of \$4,204.50.

The income tax that was withheld per W-2 forms  
from the wife's employer of \$320.80, there were  
Federal withholdings withheld by Dey Brothers &  
Company against the wife of \$990.24, there was  
withheld withholding tax in 1967 from R. A. Culotti  
Construction, this is the husband's income, of  
\$360. The excess FICA was withheld in the amount of  
\$54.91, giving us a total rounded to the nearest  
dollar of \$1726 less the amount of tax that was re-  
funded to the taxpayer, \$402. The tax paid by the  
taxpayer \$1,324. We applied that against the  
corrected tax liability and it gives us a net  
additional tax due of \$2,880.50.

MR. WELCH: I have no further questions of  
this witness, Your Honor.

CROSS EXAMINATION BY MR. SCACCIA:

Q Mr. Cullum, isn't it correct that your calculations



Gerald M. Cullem for Government, Cross.  
and computations are all predicated on the theory  
that this was income that had to be reported under  
the law?

A Yes.

Q And if the facts -- and you are not in a position  
to make a determination as to whether specific items  
in the taxpayer's returns were not taxable income,  
isn't that right?

MR. WELCH: Objection.

THE COURT: Overruled.

BY MR. SCACCIA:

Q You are not making that determination?

A I am not making, I didn't --

Q (Interrupting) You yourself are not?

THE COURT: You don't know whether it is  
income or not, you are relying on the underlying  
figures?

THE WITNESS: That's correct.

MR. SCACCIA: I have no further questions.

MR. WELCH: No further questions.

(Witness excused.)

THE COURT: Next witness.

MR. WELCH: At this time, Your Honor, the  
United States rests.

THE COURT: All right. The jury may take a

## Motion to Dismiss.

short recess.

(The jury was excused and the following proceedings took place out of the presence of the jury.)

MR. SCACCIA: May it please the Court, at this juncture, the Government having rested, I respectfully move to dismiss the indictment for failure to establish a prima facie case.

THE COURT: I will hear you very briefly.

MR. SCACCIA: Number one, Your Honor, there hasn't been a single iota of evidence that I have heard in this trial with respect to the matter of intent. We have have had nothing but testimony and evidence with respect to figures and allegations. Assuming the Government's proof as best we best on a motion such as this, assuming all the figures they have here, there hasn't been a scrap of evidence on the matter of intent, and I say for that reason, as I understand it one of the essential elements having not been proved, the Government's case falls.

THE COURT: I think there is enough inferential for a jury to find.

MR. SCACCIA: I have nothing futher.

(Thereupon a short recess was taken after which the hearing was resumed.)

(The following proceedings took place in the



Alan E. Boers for Defendant, Direct.

presence of the jury.)

MR. SCACCIA: Do you wish me to collect those calculations from the jury?

MR. WELCH: Very well. The United States offers them in evidence.

MR. SCACCIA: I have no objection.

THE COURT: I will receive them subject to the admonition I gave the jury that that is the Government's position, it is for you to say whether the labels are accurate or that they are in accordance with the evidence.

(Government's Exhibit 24 marked in evidence.)

MR. SCACCIA: The defendant calls Alan Boers.

ALAN E. BOERS

called as a witness on behalf of the defendant being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCACCIA:

Q Sir, would you speak to the juror in the corner so that we can all hear you. Would you state your name and address.

A Alan E. Boers, Fayetteville-Manlius Road, Manlius, New York.

Q And your profession or occupation sir?

A I am a Certified Public Accountant.

Alan E. Boers for Defendant, Direct.

Q And would you briefly describe your higher education and your qualifications?

A Well, I have a Bachelor's Degree in Accounting from Cleveland State University and a Law Degree from Cleveland State University, about 25 years of experience in accounting.

Q I understand you to say you are associated with Ernst & Ernst?

A Yes, I am a partner with Ernst & Ernst.

Q How long have you been so connected or associated?

A I have been employed by Ernst & Ernst since 1953; I have been a partner since 1966.

Q And in the course of this relationship and particularly in the years 1965, 1966 and 1967, Mr. Boers, did you have occasion and did your accounting firm have occasion to have an accountant-client relationship with Thomas Fahey, the defendant and the Castle Rest Nursing Home?

A We had a relationship with the Castle Rest Nursing Home; Thomas Fahey was the administrator and a partner.

Q By the way, Mr. Boers, it is not correct that you are here under subpoena issued by the Government?

A I understand that's correct.

Q And I ask you sir as to whether you had occasion



Alan E. Boers for Defendant, Direct.

in the ordinary course of discharge of your affairs with the Castle Rest Nursing Home and Thomas Fahey in 1966 to have occasion to prepare the partnership return, the form 1065 for the Federal Government?

A Yes, I did.

(Documents marked Defendant's Exhibits B, C and D for identification.)

Q Mr. Boers, I hand you Defendant's Exhibits B, C and D for identification and ask you to look at those and tell us what they are?

A Exhibit B is the partnership tax return for the year 1965; Exhibit C is the partnership tax return for the year 1966; and Exhibit D is the partnership return for the year 1967.

Q And that is for the Castle Rest Nursing Home partnership?

A For Castle Rest Nursing Home.

Q In each of those exhibits for identification in your hands, is there also appended a letter of transmittal and instruction for each one of the separate exhibits?

A Yes, there are.

Q Do those letters appear there over your signature?

A Yes.

Q Do you state that is and that they are your

Alan E. Boers for Defendant, Direct.

signature on each and every one of those exhibits for identification?

A Yes, I do.

Q And in the letters of transmittal instructions portions of each one of those exhibits B, C and D for identification are expressed specifically to Thomas M. Fahey?

A Yes, they are.

Q And to your knowledge were these transmitted physically or by mail to Mr. Fahey?

A To my knowledge they were.

Q And on the dates you have indicated?

A Yes, they were.

MR. SCACCIA: I now show Defendant's Exhibits B, C and D to the Government for its inspection and possible objection and offer the same in evidence.

MR. WELCH: No objection.

THE COURT: Received.

(Defendant's Exhibits B, C, and D marked in evidence.)

BY MR. SCACCIA:

Q And Mr. Boers, I hand you Government's Exhibit 24, ask you to take a look at that. Mr. Boers, examining that and taking the liberty to tell you that is an exhibit by the Revenue Agent who just left the



Alan E. Boers for Defendant, Direct.

witness stand a short time before the recess, and containing certain computations by him, I ask you as to whether by examining this schedule alone you as a Certified Public Accountant could make a determination as to whether a certain item is taxable income or not on the face of that.

THE COURT: Sustained.

BY MR. SCACCIA:

Q With respect to the items that are contained in B, C and D now in evidence, would you read to the Jury the line of the instructions on B, C and D?

MR. WELCH: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Is there an instruction in your letter to the taxpayer, Mr. Fahey, with respect to handling -

MR. WELCH: Same objection.

THE COURT: Same ruling. Sustained. It speaks for itself.

BY MR. SCACCIA:

Q Mr. Boers, when these letters were transmitted, prepared and transmitted to the taxpayer, did you at any time either contemporaneously before or after or about the same time give any other instructions to the taxpayers with respect to the matters contained

Alan E. Boers for Defendant, Cross.

in B, C and D in evidence?

A I don't believe I did.

Q And to your knowledge did any one under your supervision or employ at the accounting firm of Ernst & Ernst give any other instructions other than contained in B, C and D to the defendant Thomas Fahey?

A Not to my knowledge.

MR. SCACCIA: I have no further questions.

CROSS EXAMINATION BY MR. WELCH:

Q Now Mr. Boers, you started your testimony by indicating your relationship with the Castle Rest Nursing Home, did that include as to what should go on partnership income tax returns, was that part of your professional relationship with that partnership?

A I am not sure I understand your question. My understanding of our assignment, we were to prepare the partnership return.

Q Now then was it your understanding of your assignment that you were also to advise the individual partners as to what they should put on their individual income tax return?

A No, it was not.

Q Now Mr. Boers, those exhibits B, C and D,



Alan E. Boers for Defendant, Cross.

Defendant's Exhibits B, C and D, specifically the letter attached to the front of those referred to by Mr. Scaccia, Exhibit B is a letter of March 7, 1966 -- well, the question I have is did you write a similar in the year 1968?

A Yes, I did.

Q Did you bring that letter with you today?

A You are referring to this Exhibit D?

Q I withdraw my question and restate my question, did you write such a letter in April 1969 in relation to the 1968 partnership returns?

A Yes, we did.

Q Did you bring that letter with you today?

A Yes.

Q Would you produce that letter please?

(Document marked Government's Exhibit 25 for identification.)

Q Mr. Boers, while the Clerk is marking the document you just produced, did you also prepare the income tax return for that partnership for the year '68?

A Yes.

Q When did you do so?

A Early in 1969.

Q Directing your attention to what has been marked as Government Exhibit 25 for identification, would

Alan E. Boers for Defendant, Cross.

you tell the ladies and gentlemen of the jury what that is?

A This is the U. S. Partnership return of 1968 of Castle Rest Nursing Home.

Q Is that the original or a copy?

A This is an office copy.

Q Your office copy?

A Yes.

Q All right. Now I would ask you to produce the letter you wrote in 1969, is that attached thereto?

A Yes, it is in the return.

Q That is your office copy?

A Yes.

MR. WELCH: The United States offers Exhibit 25 into evidence, Your Honor.

MR. SCACCIA: I object to it as not being within the issues of this indictment, Your Honor, it is post-indictment.

MR. WELCH: May we approach the bench?

THE COURT: Just tell me.

MR. WELCH: It goes to Mr. Fahey's knowledge that he had to report his.

MR. SCACCIA: I object to that.

THE COURT: You offer it as to guilty knowledge?

MR. WELCH: Yes.



Alan E. Boers for Defendant, Cross.

THE COURT: I will take it.

(Government's Exhibit 25 marked in evidence.)

BY MR. WELCH:

Q Now Mr. Boers, in response to Mr. Scaccia's question you indicated that -- well, but -- so I don't misstate it, let me reask the question, other than what was said in the letter for the years 1966 and 1967 did you give Mr. Thomas Fahey any other advice as to that item in his income tax return which talked about salaries to partners or on the partnership return did you give him any other advice as to what he should do in regard to his personal individual income tax return?

A No, I don't believe I did.

Q Now then did there come a time in 1966 when you were doing your accounting work for Ernst & Ernst that you prepared certain documents at the request of Mr. Fahey for the return of withholding taxes?

A Yes.

Q And specifically what documents did you prepare in that regard?

A I am not sure about the year, but in one of the years the partnership was -- very shortly after Mr. Fahey came to us, the previous accountant had had him withholding Federal Income Tax and state

Alan E. Boers for Defendant, Cross.

income tax and paying unemployment insurance and also Social Security Tax. This is not proper for a partner of a partnership, and we prepared some documents so that Mr. Fahey could claim the income tax paid as a credit on his income tax return and we also prepared some documents --

Q (Interrupting) Well, if I might interrupt you right there, so Mr. Fahey took a claim on his individual income tax return, you mean?

A Yes.

Q Did you so tell Mr. Fahey he should take that claim on his individual income tax return?

A I cannot remember the specific conversation because it has been so long ago.

Q What documents did you prepare?

A I prepared a W-2 form or -- yes, a W-2 form.

Q Do you have those documents with you here in Court today?

A Yes, I believe so.

Q Mr. Boers, did you prepare for Mr. Fahey a W-3 from Reconciliation of Income Tax?

A I believe we prepared that for the partnership.

Q You did prepare for the partnership?

A Yes, that is the form that the employer files.

Q Well in relation to what employee was that form



Alan E. Boers for Defendant, Cross.

prepared?

A Mr. Fahey.

Q And for whose signature was it prepared?

A Probably Mr. Fahey's.

Q Well, do you have the copy of it in his file

A Well, I am looking for it. I don't seem to have it here. Could it be with those papers I have just given you?

Q Well, did you have occasion to prepare a form 843 for a Mr. Fahey or for the Walker McKinney Associates?

A Yes, I did.

Q Did you bring your copy of that with you today?

A Yes, I have that here.

(Document Government's Exhibit 26 for identification.)

MR. SCACCIA: I have no objection, this doesn't contain the signature of the defendant but we will stipulate he signed the original and submitted it to the Government.

THE COURT: All right.

MR. WELCH: If Your Honor please, then my understanding is that the defense is stipulating that that form 843 was signed and submitted by Mr. Fahey?

Alan E. Boers for Defendant, Cross.

MR. SCACCIA: Submitted by Mr. Fahey, yes.

MR. WELCH: We move it into evidence.

THE COURT: Received.

(Government's Exhibit 26 marked in evidence.)

BY MR. WELCH:

Q Now Mr. Boers, did there come a time when in your relationship in 1966 or '67 you explained to Mr. Fahey that he was to file quarterly estimates for the Federal Government?

THE COURT: You mean on his individual return, partnership return or what?

BY MR. WELCH:

Q As to his individual return, Mr. Boers.

MR. SCACCIA: I am going to object to this, the witness ~~already~~ testified he never gave any advice to Mr. Fahey beyond what he ~~already~~ testified to.

THE COURT: I know he did, but this is cross examination.

MR. SCACCIA: I withdraw my objection.

THE WITNESS: I can't recall specifically that I did that, I think in previous testimony I was surmising that this is the type of conversation which may have taken place.

BY MR. WELCH:



Alan E. Boers for Defendant, Redirect.

Q Well Mr. Boers, do you recall being subpoenaed to testify before a Federal Grand Jury on May 22, 1974?

A Yes.

Q Do you recall being asked these questions and giving these answers: "Q - Did you advise him how to treat his salary? A - I don't recall that I did, I really didn't think that there was any -- again any question about the amount. Q - Well, not as to whether or not it would be a salary but as to what he should do with it on his own individual tax return? A - Well, I specifically remember advising him to file a quarterly estimate since he would have -- since he would not have any tax taken out of his salary." Do you recall being asked those questions? And giving those answers?

A Yes.

MR. WELCH: I have no further questions.

MR. SCACCIA: Just one more.

REDIRECT EXAMINATION BY MR. SCACCIA:

Q Mr. Boers, what is your best present recollection as you sit in this Court room today? As to whether or not you ever advised Tom Fahey with respect to estimated quarterly returns in respect to his individual tax returns at any time in the indictment years?

Alan E. Boers for Defendant, Redirect.

A My best recollection is that he did not -- I cannot recall the specific instance or the specific words. My testimony before the Grand Jury is incomplete because I had no idea whether Mr. Fahey had any tax liabilities, I knew nothing about his personal affairs.

MR. SCACCIA: I have no further questions.

THE COURT: All right. Would counsel come to the bench?

(The following proceedings took place at the bench out of the hearing of the jury.)

THE COURT: Mr. Scaccia, I cut you off on a question by you to the effect that Exhibit 24, whether any of this was income, I did so because I could not at one quick look tell about it, but you might be able to tell from these figures what this was, so I was improper in cutting you off and if you wish you may ask him the question.

MR. SCACCIA: That is all right, I have another accountant.

(The following proceedings took place in the presence of the jury.)

THE COURT: All right, you are excused.

MR. SCACCIA: I will call Mr. Michael Foogy.

MICHAEL P. FOOGY



Michael P. Foody for Defendant, Direct.

called as a witness on behalf of the defendant  
being first duly sworn was examined and testified  
as follows:

DIRECT EXAMINATION BY MR. SCACCIA:

Q Mr. Foogy, would you state, speaking to the jury and  
elevating your voice, if you would, would you state  
your full name and address?

A Michael Patrick Foogy, 111 East Gate Road, Cammilus.

Q And your profession sir?

A I am a CPA Manager with Ernst & Ernst.

Q Would you briefly describe your higher educational  
training and your experience in your profession?

A Well, I graduated from LeMoyne College in 1959  
with a Bachelor's Degree in Business Administration,  
Accounting major. I started with Ernst & Ernst  
when I got out of school. I have been with them  
15 years. I have been certified for 12 of those  
15 years.

Q In the state of New York?

A Yes.

Q Sir, did you in the course of that association  
with Ernst & Ernst have an occasion to come into  
contact with the accounting work on behalf of Castle  
Rest Nursing Home and in that capacity with Thomas  
Fahey, the defendant here?

Michael P. Foody for Defendant, Direct.

A Yes, I did.

Q Can you tell the court and jury briefly as to when that relationship started and what the responsibilities were?

A Well, I supervised audit of Castle Rest Nursing Home since 1967, I believe was the first year of their audit, and was the account executive on that account from approximately 1969 on. I also served as General Business and Financial Advisor to that operation.

Q And in the course of those duties and discharges of these things did you become familiar with the preparation of returns?

A Yes.

Q Did you also become familiar with the various letters of transmittal accompanying the partnership returns?

A Yes, sir.

Q Incidentally, you were subpoenaed here by the Government, were you not?

A Yes.

Q I show you Defendant's Exhibit B, C and D and ask you to look at those and tell us if you recognize them?

A Yes.

Q And can you tell of your -- I appreciate they were



Michael P. Foody for Defendant, Direct.

signed by Mr. Boers, a previous witness who testified, can you tell the Court and jury as to what if any connection with those documents in evidence were?

A Well, 1967 is the only one that I think I have -- had any real connection with, because that was the year of the audit, but these were prepared by Allen without audit for those first two years of pre-operating years. I believe '67 was the first operating year.

Q But were they prepared with your knowledge?

A Well, certainly with my knowledge, I was with the firm at that time.

Q Did you know according to the respective dates on B, C and D they had been transmitted to and delivered to Thomas Fahey his all -- to Thomas Fahey, a partner?

A Yes, sir.

Q And can you tell the Court and Jury with respect to the letters of transmittal on each one of those partnership returns as to what the purpose was if you know for those letters?

A Well this is very common --

MR. WELCH: Objection.

THE COURT: Sustained.

Michael P. Foody for Defendant, Direct.

BY MR. SCACCIA:

Q Did you have a regular course of business at that time and can you tell the Court as to whether those letters were sent out in the regular course of business with respect to the transmittal of those?

MR. WELCH: Objection, they are already in evidence.

BY MR. SCACCIA:

Q Can you tell us as to whether -- I appreciate from the different addresses as to who they were sent -- were to be instructed by that letter accompanying those returns --

MR. WELCH: Objection.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Can you tell this Court and jury whether there were any instructions, written or oral, direct or indirect, expressed or implied to your knowledge to Thomas Fahey other than contained on the face of each of those exhibits in your hand?

A I know of no other communication to the partners with instructions on their returns other these.

Q And does that include the other partners, Dr. Simpson and Walker McKinney in addition to Mr. Fahey?

A Yes.



Michael P. Foody for Defendant, Direct.

Q And each of the partners received the same copies of the letters with the return?

MR. WELCH: I object.

THE WITNESS: Yes, sir.

THE COURT: You don't know whether they received them, do you?

THE WITNESS: No.

THE COURT: Think before you answer, you are under oath.

THE WITNESS: I don't know.

BY MR. SCACCIA:

Q Now with respect to Government's Exhibit 24 in evidence which I hand to you, can you tell us after checking that as to whether you could make a determination -- incidentally, 24 is the same as the juror's hand -- have in their hand -- as to whether those items are reportable taxable income or not on the face of that exhibit?

A I am not sure what these reports are.

Q Well, if I may, a Government Revenue Agent testified with respect to that exhibit and set forth those figures, and I am asking you to whether there is any way that these -- any way that you can tell us that a Certified Public Accountant reading that document as to whether or not any one or more of

Michael P. Foody for Defendant, Cross.

the items is reportable, taxable income or not?

THE COURT: Would you amend your question  
Certified Public Accountant for the nursing home  
involved?

BY MR. SCACCIA:

Q For the nursing home involved, for the Castle Rest  
Nursing Home?

A This doesn't seem to me to have anything to do with  
the nursing home partnership return. Maybe I am  
missing the point.

MR. SCACCIA: That is the point. Thank you.

I have no further questions.

CROSS EXAMINATION BY MR. WELCH:

Q Mr. Foody, you testified then that you are familiar  
with the accounting for the partnership for the  
Castle Rest Nursing Home?

A Yes, sir.

Q If you will direct your attention to Exhibits B, C  
and D in clarity as a Certified Public Accountant  
of the Castle Rest Nursing Home can you tell whether  
or not the figures put in Schedule K, column 6 on  
those exhibits is reportable income by the partner  
who received them?

A It would be my opinion that the amount in column 6  
would be payment to partners, salary and interest.



Michael P. Foody for Defendant, Cross.

Q Would you look at each exhibit and tell the ladies and gentlemen that please?

A You will have to -

Q If you would please.

A can I qualify it?

Q If you would answer the question please.

A All right.

Q Schedule K, column 6.

THE COURT: What are the partnership returns, information returns?

THE WITNESS: Yes.

THE COURT: Do they report the income of the partnership?

THE WITNESS: Pardon sir?

THE COURT: Do they report the income of the partnership?

THE WITNESS: I am sure they do.

THE COURT: Do they show the distributive share of each partner?

THE WITNESS: Yes.

THE COURT: And is that distributive share taxable to that partner?

THE WITNESS: Yes.

THE COURT: Is it shown on each of the returns?

THE WITNESS: Yes.

Michael P. Foody for Defendant, Redirect.

THE COURT: For each of the years involved?

THE WITNESS: Yes.

THE COURT: That is so as to the defendant who is a partner in the firm, is that right?

THE WITNESS: Yes.

BY MR. WELCH:

Q Now Mr. Foody, I might ask you one final question, did there ever come a time during 1966, '67 or '68 when you told Mr. Fahey that the salary he earned with the Castle Rest Nursing Home was not reportable taxable income?

A I never told him it was or was not.

MR. WELCH: I have no further questions.

REDIRECT EXAMINATION BY MR. SCACCIA:

Q Did you ever tell him it was taxable reportable income?

A No, sir.

Q Isn't it correct B, C and D did give him instructions as to what to do with the items from the partnership return with respect to the handling of that item in Schedule K in the preparation of his return?

A It made no mention of Mr. Fahey in the transmittal letter.

Q And in short, the amounts received by the defendant Thomas Fahey, he was not instructed that he had to



Michael P. Foody for Defendant, Redirect.

report anything of the amounts received from Castle Rest on his --

MR. WELCH: Objection, Your Honor, the letter stands for itself.

THE COURT: Sustained.

BY MR. SCACCIA:

Q And is there any question Mr. Foody that Thomas Fahey had a right to rely on the instructions that were issued to him, those specific instructions on B, C and D?

A I think that our clients will rely on our instructions.

THE COURT: Sustained. It is a matter of law whether he had a right to rely on it, and this witness is not competent to give that answer in this Court room.

BY MR. SCACCIA:

Q And in your experience with Thomas Fahey with respect to tax affairs in the years in which you described, did you ever find a departure, can you tell the Court and Jury if any departure from any of your instructions given to him?

A I never instructed him on his tax affairs.

Q Insofar as the nursing home is concerned?

A No, so far as the nursing home is concerned, all my

Michael P. Foody for Defendant, Redirect.

advice -- I am not sure he took it all from the  
audit standpoint --

Q Did you have any occasion ever that he did anything  
about following your advice?

A No, sir, I have no occasion, I can't recollect.

Q And with respect to B, C and D, can you tell this  
Court and Jury if you -- as to whether there is any  
amount in any of the partnership returns opposite  
Thomas Fahey's name for either 1966, '67 or '68  
in the transmittal, B, C or D, is there any amount  
shown opposite Thomas Fahey's name in Schedule K,  
column 4, and please examine each one?

A Well, I know there isn't.

Q It is blank, is it not?

A Column 4 Schedule K --

THE COURT: The form doesn't have a provision  
for that?

THE WITNESS: Provision for what?

THE COURT: For showing the distributive shares  
of all partners by name.

THE WITNESS: Yes, it does.

THE COURT: It does?

THE WITNESS: Yes, you list the names and then  
the rest of the form follows.

THE COURT: What is the distributive share of



Michael P. Foody for Defendant, Redirect.

Thomas Fahey in each of those years?

THE WITNESS: His distributive share of partnership income, the income of the partnership, they had losses on those years and he got none of those losses, they were distributable losses, none were under the partnership agreement where they were attributable to him, or attributed to him, anyway.

THE COURT: There was no income for any of these years?

THE WITNESS: There is a loss in the first year, second year.

THE COURT: What years?

THE WITNESS: This is '65, '66 and '67.

THE COURT: Were all losses?

THE WITNESS: Yes.

BY MR. SCACCIA:

Q So the short of it, as I understand the Court's question, is that in each of the years '65, '66 and '67 the nursing home partnership had loss years in each of the years, and since Mr. Fahey did not share in any of those losses he didn't have any losses assigned to him and there was no partnership distribution to him to report, correct?

A Well, I am not an expert on partnership tax law, but I would say that if he relied on that letter --

Michael P. Foody for Defendant, Recross.

MR. WELCH: Objection.

THE COURT: Sustained.

BY MR. SCACCIA:

Q In any event there is no amount opposite Thomas Fahey's name in Schedule K, column 4 with respect to any amount, isn't that correct?

A There is no amount there.

Q But there are amounts with at least two of the other partners, I think Dr. Simpson and Walker McKinney, correct?

A Yes.

MR. SCACCIA: No further questions.

MR. WELCH: May I have some recross examination?

THE COURT: Yes.

RE CROSS EXAMINATION BY MR. WELCH:

Q To clarify this, Mr. Foody, if you will turn to the year 1966, Schedule K? All right, in answer to those questions you indicated that the partnership was a losing proposition that year and that some of the partners received a distributive share of the losses, correct?

A Yes.

Q Where is that reflected in Schedule K?

A That is in column 4.

Q And which partner received a distributive share of



Michael P. Foody for Defendant, Redirect.

that loss?

A Walker McKinney and George Simpson.

Q Directing your attention to column 6, what is in there?

A Column 6 opposite Mr. Fahey's name is payment to partners, salaries and interest \$14,994.

Q Now from your experience as the accountant for Ernst & Ernst and working on the Castle Rest Nursing Home account, applying your expertise, your familiarity with that form, if you will direct your attention to Government's Exhibit 24 as to the year 1966, specifically line A under increased or decreased income, what figure is shown there?

A \$14,994.

Q If that figure was taken from the partnership return Schedule K, column 6, is it reportable income?

MR. SCACCIA: I object.

THE COURT: <sup>U</sup>verruled.

BY MR. WELCH:

Q Would you answer the question?

A Yes, I would think so, but again --

Q That is all I am asking you is that question. I have no further questions.

REDIRECT EXAMINATION BY MR. SCACCIA:

Q Mr. Foody, can you tell the Court and jury then as

Michael P. Foody for Defendant, Redirect.

to why you didn't instruct Thomas Fahey --

MR. WELCH: Objection, Your Honor.

BY MR. SCACCIA:

Q -- as to Schedule K, column 6?

A I would say it is an oversight.

MR. WELCH: Objection.

THE COURT: I will let him answer.

THE WITNESS: I would say it was an oversight on our firm when Mr. Boers prepared that, I think he had to -- if he had to do it now he would do it differently.

THE COURT: You don't know, you are just guessing.

THE WITNESS: Well --

THE COURT: You didn't have anything to do with it?

MR. FOODY: Mr. Boers and I talked about it.

THE COURT: At the time did you talk about it?

THE WITNESS: Since then.

THE COURT: No, strike it.

BY MR. SCACCIA:

Q In any event you did not give Mr. Fahey instructions with respect to column 6, isn't that correct?

A That is correct.

THE COURT: You didn't give him instructions



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one way or the other as to how he should handle  
that item?

THE WITNESS: That's right.

THE COURT: Is that your testimony?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. SCACCIA: No further questions.

MR. WELCH: Nothing further.

(Witness excused.)

THOMAS M. FAHEY

called as a witness on behalf of the defendant  
being first duly sworn was examined and testified  
as follows:

DIRECT EXAMINATION BY MR. SCACCIA:

Q Would you state your full name and address?

A Thomas M. Fahey, 316 Berkley Drive, Syracuse.

Q And what is your profession or occupation?

A I am a Hospital and Nursing Home Administrator.

Q And would you state briefly your higher educational  
qualifications and your experience in recent years?

A I am a graduate of LeMoyne College and I have a  
Master's and -- in Hospital Administration from  
Columbia University in 1956. I have worked in  
both hospitals and nursing home administration.  
I was with Upstate Medical Center in Syracuse for

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about four years after receiving a Master's Degree, was an Executive Officer in the United States Air Force in France. I was involved in the development of another nursing home in Syracuse for about two years, and then I undertook to arrange and plan the development of the conversion of the Syracuse General Hospital from a hospital when it merged with the Community General Hospital into a nursing home, and undertook to put a partnership together to effect the conversion and to operate the nursing home.

Q And about when was that sir?

A The partnership -- well, I worked on that from early in 1964 until finally a partnership was formed in November 1964, consisting of Walker McKinney, Dr. George Simpson, Ted Metzger and myself.

Q And was that partnership evidenced by any writing to your recollection?

A Yes, actually there were -- when we originally made our agreement we committed it to a written memorandum of understanding signed by the four partners, and that was I think November 1964. That was then codified in a limited partnership agreement in January 1965.

Q Just stop there, that was before the November '65



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agreement that is in evidence?

A Yes.

MR. WELCH: Let me just state my objection, Your Honor, to this business of the other agreement as irrelevant, and I object to that line of questioning.

THE COURT: If it is irrelevant, let me see it. First let's offer it, make an offer.

MR. SCACCIA: May the record show I have previously since about January 28 of this year furnished photostatic copies of this material to United States Attorney.

THE COURT: That has nothing to do with it. Just mark it as the next exhibit in order.

(Document marked Defendant's Exhibit E for identification.)

THE COURT: You say it is irrelevant?

MR. WELCH: May I see it?

THE COURT: I will hear you up here, I don't see any relevance.

(The following proceedings took place at the bench out of the hearing of the jury.)

MR. SCACCIA: If I can be permitted to show that there were three partnership agreements. We have one in evidence of that documentation and I

Thomas M. Fahey, the Defendant, Direct.

say that on its face it is complete, I want the entire partnership agreement, the relationship can only be spelled out by all the documents that we have.

THE COURT: You state the partnership is spelled out in three agreements?

MR. SCACCIA: Yes, Your Honor, three writings.

THE COURT: Let me see the three writings.

MR. SCACCIA: This is one, that is two, and the third is in evidence.

THE COURT: Mark that and let me see it.

(Document marked Defendant's Exhibit F for identification.)

MR. SCACCIA: And there is absolutely nothing said about salary until you get to the third one.

Turn to another subject, so I will have a chance to study them over the recess.

(The following proceedings took place in the presence and hearing of the jury.)

BY MR. SCACCIA:

Q Mr. Fahey, in the interest of trial economy we will defer this at this moment and come back at another time during the course of the trial. In any event, can you tell the Court and jury about -- without making reference to the agreement of November '64



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and January '65, chose that predated the November  
'65 agreement, can you then describe the development  
of the partnership from the point at which I last --

MR. WELCH: Same objection, Your Honor.

THE COURT: I think it does get into the area,  
we just have under advisement here.

BY MR. SCACCIA:

Q All right, bearing in mind --

THE COURT: Turn to some other phase.

BY MR. SCACCIA:

Q Can you describe to the Court and jury how the  
partnership went on, the construction, the date of  
the physical construction and when it opened for  
business and that sort of thing, that will take us  
through and around the exhibit.

MR. WELCH: Again, Your Honor, it is all irre-  
levant to the --

THE COURT: I think it is immaterial.

MR. SCACCIA: There has been testimony here  
by Culotti and this is going to bear on Culotti,  
because as I remember Culotti's testimony he testi-  
fied with respect to payments made before and during  
the indictment years, and this is what I want to  
get into, if I may.

THE COURT: I see. You are right. Go ahead.

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Overruled.

BY MR. SCACCIA:

Q Please go on.

A When we originally made our original agreement was in November 1964, and then we got into this limited partnership of '65. We operated under that for a year until December of '65. During that period of time my responsibility was to obtain mortgage financing from six participating banks in the project, to make all the applications to the various regulatory agencies involved in approving a nursing home facility, and particularly the conversion of an older building, coordinating with the architect and the builder in the planning of the renovation, and that went on until about the middle of 1966. Actually all those factors came together in September of 1966 when we got all the approvals and the financing necessary to begin the major renovation of the building, and that started in December 1966 and proceeded into the middle of '67. As we got into construction I was coordinating, representing the owner's interest with the builder and coordinating the hiring the first staff of the organization, set up the department heads and setting down operating policies and that sort of thing. We commenced



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operation in May of 1967 and became a functioning nursing home in that time.

THE COURT: In light of Culotti's testimony, I overruled the Government's objections to Exhibit 19. Would you mark these others, Defendant's E and F, those are received.

(Defendant's Exhibits E and F marked in evidence.)

BY MR. SCACCIA:

Q And Mr. Fahey if you will just take the balance of the day and describe to the Court and jury your relationship with Mr. Culotti or his firm, the gentleman who testified earlier in the day.

A As part of any developmental role in putting this project together very early in 1964 before meeting any of the partners, I recognized the potential of the conversion of the Syracuse General Hospital into a modern nursing home facility and undertook for several months to make arrangements with a builder, Mr. Culotti, an architect, Mr. Capacelli and the bank involved in the beginning of this thing and regulatory bodies and I ascertained that a corporation version could be effected, that the money could be obtained and I made an arrangement with Mr. Culotti if I were able to get the bank

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financing --

Q So there is no confusion, would that be Mr. Culotti Senior and not the Mr. Culotti that appeared here today?

A Yes, now deceased, I made arrangements with him that should I be able to put all these elements together plus obtaining financing in the form of operating capital, that he would get the construction contract and I would during the course of doing all these tasks be working for Mr. Culotti, and that he would pay my salary during that intervening time.

Q And did he do so?

A Yes.

Q And does that fairly describe your relationship with Culotti during the period you testified?

A The expense involved my salary would be charged as another kind of construction cost, as an ordinary kind of construction cost, as an ordinary cost of construction.

Q By Culotti Construction?

A Yes, that's correct.

Q And does that fairly describe your relationship with the Culotti Construction up to the opening of the nursing home in 1967?



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A Yes.

MR. SCACCIA: Is this an appropriate time?

THE COURT: Yes, we will recess now until tomorrow morning at 9:30. I -- the air conditioning here is so noisy it is better if we start a little earlier in the morning and leave a little earlier in the afternoon, so please try to be prompt. Don't talk about the case with anyone, don't let anybody talk about it with you. Keep an open mind, wait until you have heard all the evidence and the Court's instructions.

(Thereupon a recess was taken to June 7, 1974 at 9:30 a.m.

Proceedings, dated June 7, 1974.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
- UNITED STATES OF AMERICA

-  
- against -  
-

- THOMAS M. FAREY  
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Criminal No. 73-CR-181

The following proceedings took place at the  
United States District Court, Federal Building, Auburn,  
New York, continuing on the 7th day of June 1974 before  
Honorable Lloyd F. MacMahon, United States District Judge,  
and a jury.

A P P E A R A N C E S:

HONORABLE JAMES M. SULLIVAN, JR.

United States Attorney

EUGENE WELCH

Assistant United States Attorney

Attorneys for United States of America

Federal Building

Syracuse, New York

LOVE, BALDUCCI & SCACCIA, ESQS.

DANTE M. SCACCIA, ESQ.

Attorneys for Defendant

Wilson Building

Syracuse, New York



Thomas M. Fahey, the Defendant, Direct.

THE COURT: All right, proceed.

Thomas M. Fahey resumed the stand having been previously sworn.

DIRECT EXAMINATION CONTINUED BY MR. SCACCIA:

Q Mr. Fahey, picking up at a point yesterday when we made a slight detour, and just to make the point clear, I hand you Defendant's Exhibit E and F and Government's Exhibit 19, I hand them to you and would you briefly describe to the Court and jury what those documents are? How if at all they are related to the nursing home operation at that time?

A Yes. As I said yesterday the four partners agreed among themselves on November 23, 1964 that we would form a partnership, and our general understanding as to how the relative interests of the partners would be in that partnership were reduced to this document here which was drafted.

Q Would you read the little tag appearing on the face of it?

A Defendant's Exhibit E.

Q Yes, thank you.

A And this was a memorandum of what our understanding was as to what our partnership relations would be, and we each signed it, we struck our deal.

Q And does that bear a date?

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A November 23, 1964.

Q Yes, go on, and then with respect to the next document?

A We said that we would have to get this to a lawyer to be put in legal language, and it was submitted to Mr. McKinney's attorney and we all agreed he would write up the agreement.

Q And would that have been Mr. Murray?

A Mr. Murry.

Q Please go on.

A And he drafted this Exhibit F which is a limited partnership agreement dated January 4, 1965, and we operated under this partnership agreement for approximately a year.

Q And then if -- what, if anything, happened, sir?

A Well, this is in the year 1965, and we were applying for our regulatory approval before our -- before we could begin renovation of the nursing home, and the state insisted that -- they had made a rule that limited partnerships could not operate nursing homes, it had to be a general partnership, and they insisted that they would just hold our operation -- our application in suspension until such time as we conformed with that requirement.

Q And you are referring to the State of New York?



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A Department of Social Services.

Q Which has rules governing the licensing and administration of nursing homes in the State of New York?

A That's correct.

Q Please continue.

A Well, we decided that is what we had to do, we had to do it, and at that time we had an attorney in Syracuse who was doing some work for the partnership in conjunction with the application that we had to fill out and that sort of thing, Mr. John Gallagher, and the partners agreed among us that we would just change all the intents of this limited partnership.

Q Referring to Defendant's Exhibit D, you have to refer to that.

A Exhibit F, that a new partnership agreement would have to be written and a general partnership agreement that we wanted this to be carried forward to a new partnership agreement, and Mr. Gallagher drafted it of a general partnership agreement and submitted it to Mr. Murray, Mr. McKinney's attorney, which created some problems because the partners had agreed among themselves that the intent of the limited partnership would be carried forward into this one, and Mr. Murray insisted --

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Q You say this one, you are talking about the limited partnership agreement marked E in evidence, the limited partnership agreement?

A 1965, January '65, the intent of Exhibit F would be carried forward to Government Exhibit 19, which is the general partnership agreement. That created some problem. That was the agreement among the partners, but Mr. Murray made a rather substantial change in this agreement which I strenuously refused to --

Q Referring to Government's 19?

A Yes.

Q Would you tell the Court and jury briefly what the nature of those objections were as stated to counsel for McKinney?

MR. WELCH: I renew my objection, this is all irrelevant.

MR. SCACCIA: If it please the Court --

THE COURT: Overruled.

BY MR. SCACCIA:

Q Please go on Mr. Fahey.

A That the specific thing was in the limited partnership agreement, Exhibit 19, I was entitled to 45% of the depreciation in this partnership. When this was changed to the general partnership agreement,



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Exhibit 19, Mr. Murray inserted a new Article 8 giving all the depreciation to Mr. McKinney and Dr. Simpson, and this created a real problem between us, and I strenuously objected to it. We met in Mr. Murray's office in New York somewhere around the 16th of November 1965 and had a real blowup over this thing, and Mr. Murray said that at this point in time Mr. Culotti had been -- a commitment was made by Mr. Culotti, he had put a lot of time into planning the renovation, the architect I had lined up had spent a year in working with me on the renovation plans, and they had a lot of expense tied up in this thing and if this project fell through at this point they would be out, and Mr. Murray said that McKinney will pull out unless you agree to this thing, and with those factors in mind I had no choice but to sign the agreement.

Q Referring to Government 19?

A Yes.

Q And then what if anything happened thereafter, sir?

A That was the first disagreement we had among ourselves as partners, but then we proceeded and we got -- my objective was to get the place renovated and opened, and we proceeded on to get the thing lined up.

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renovated and opened, and we proceeded the financing lined up. Now we could get the government approval to proceed since we had a general partnership agreement. But what required, we got all those approvals, we got all that financing and acquired title to the property in September of 1966 and began renovation the next day. After this thing there were no problems between the partners at all, in fact we were all working toward this goal until the renovation was in progress and the costs began to mount on the thing, and Mr. McKinney began to become unhappy with the general partnership agreement, Exhibit 19.

Q Yes, and what did he say if anything with respect to it?

MR. WELCH: If Your Honor please, what Mr. McKinney said is all hearsay.

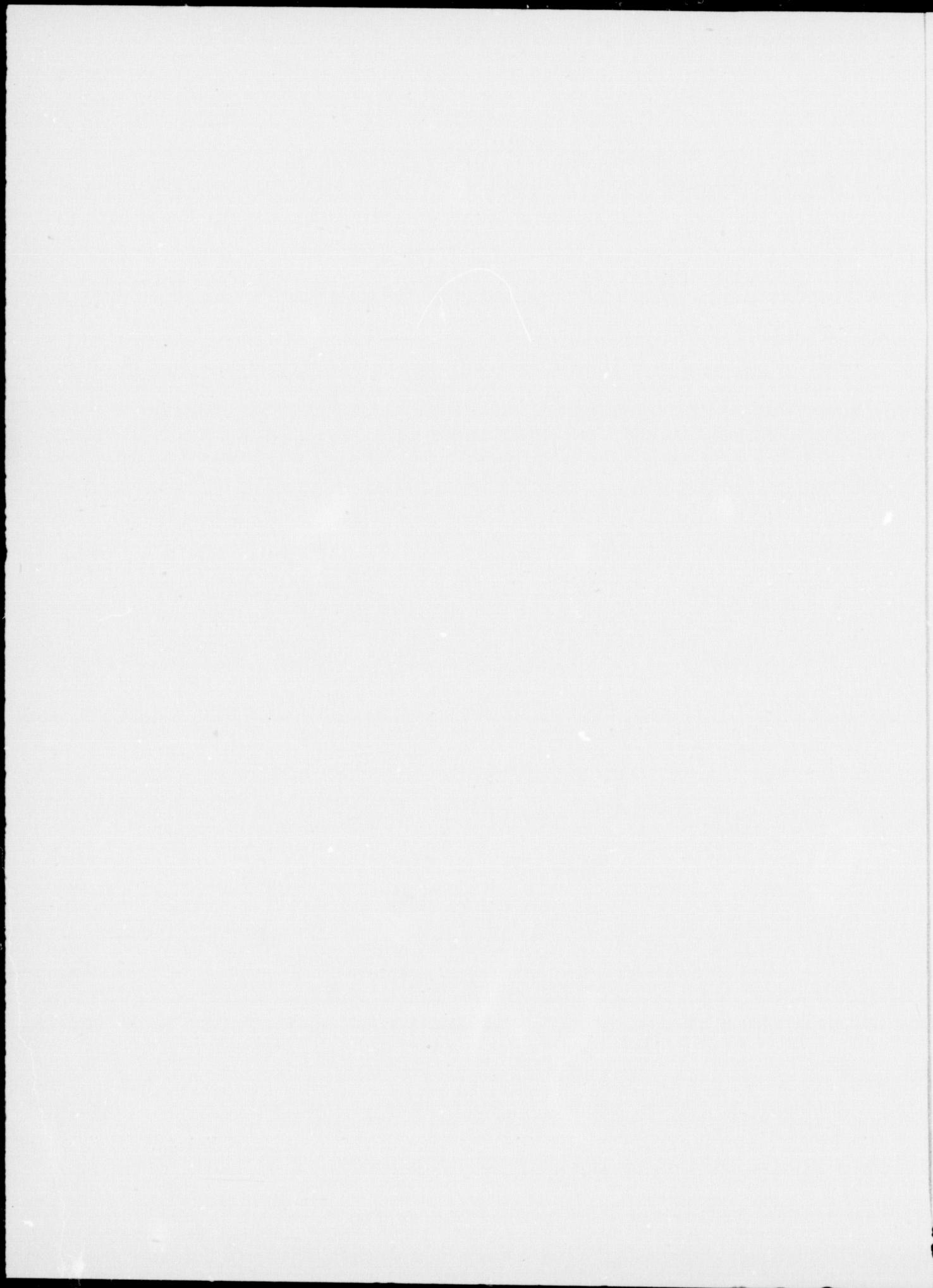
THE COURT: Sustained.

BY MR. SCACCIA:

Q Just pass on, Mr. Fahey, describe what happened thereafter.

A As the construction commenced and the costs began to rise on it, we had some discussions about changing the partnership agreement, and this came up frequently, and we would be discussing this





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back and forth throughout the tail end of the construction period and into --

MR. WELCH: May I renew my objection, the subsequent discussions, the exhibit speaks for itself, it is a contract binding on the parties signing it, any subsequent discussion is irrelevant.

THE COURT: It would be except you opened the door, didn't you? Overruled.

BY MR. SCACCIA:

Q Please go on Mr. Fahey.

A During the year 1967 the construction ended around -- we opened our doors to operation in May, and I was completely -- there wasn't much discussion during that period of time about these partnership matters, I was concerned with getting the thing operating and getting going. We finished our first operation year the end of '67 and we were going to have -- that was a loss year, and we were anticipating a profitable year for '68, and that opened the door and we had kind of like an annual meeting in January of '68 among the partners at the nursing home and --

MR. WELCH: Your Honor, I object to this testimony. May we approach the bench and be heard on this question please?



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THE COURT: Do you have anything to say you haven't already said?

MR. WELCH: Yes, I think I do.

THE COURT: All right.

(The following proceedings took place at the bench out of the hearing of the jury.)

MR. WELCH: If Your Honor please, Your Honor ruled against us. The Government opened the door as to Mr. Fahey with the Culotti Construction Company --

THE COURT: That was not my ruling, my ruling was you got into post-indictment years, and once you do that then he can do it, why these were different or why they were similar, you opened the door to post-indictment years, so that is the problem.

MR. WELCH: But this testimony has nothing to do with the '68 return.

MR. SCACCIA: It certainly does.

THE COURT: It may not have anything to do with the '68 return and it may, how do I know?

MR. WELCH: If Your Honor please, could we have some ruling from Your Honor before we get into a side trail? The question was --

THE COURT: I think, Mr. Scaccia, that you are

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going very wide to demonstrate what the income arrangements were. Beyond that it seems to me this is largely immaterial.

MR. SCACCIA: We are getting right to it.

THE COURT: Well, get to it, it is taking too long.

MR. SCACCIA: We have to explain why the two returns were filed in '68, and the Government put that proof in, we are laying the foundation.

THE COURT: I don't see why you have to prove that, there is no doubt about it.

(The following proceedings took place in the hearing of the jury.)

BY MR. SCACCIA:

Q I am trying to recall what Mr. McKinney had testified to during his testimony, Mr. Fahey, as I recall the letters and agreements with respect to paying the partners occurred on or about September 6, 1967, can you tell the Court and jury as to whether there were any meeting or discussions at about that time or preceding that time having to do with payments?

A Yes, there were. In May through September of 1967 and culminating in some letters of employment in 1967 the partners among ourselves agreed that we would all be drawing money from the partnership for services.



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I was to act as the Administrator, that was clear. McKinney was to act as the Financial Director, and Dr. Simpson was to be our Medical Director. We were all to draw salaries in those capacities, and we agreed among ourselves that those would be treated as advances against our future profits.

Q And with respect to Mr. McKinney, is that what you are telling us Mr. McKinney testified to yesterday?

MR. WELCH: If Your Honor please, the jury heard Mr. McKinney testify.

THE COURT: Sustained.

BY MR. SCACCIA:

Q In any event, given that, and that culminated in '67 with respect to all four partners?

A No, Mr. Metzger was not included. Dr. Simpson, Mr. McKinney and I.

Q Now taking you to 1968 at about the time of the January conference, would you tell the Court and jury as to whether anything was touched on with respect to the pay or the draws or the advances or remuneration to anyone of the three partners?

A In the January meeting we agreed that we were going to change the partnership, we agreed that we all had an interest in changing the partnership agreement and striking a new one. We were all unhappy

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with it.

Q That was the contention as of January '68?

A Yes, we wanted to codify the changes in the payment arrangements we had between us.

Q All right and now I will hand you directly Defendant's Exhibits B, C and D, Mr. Fahey, and ask you to tell the Court and Jury as to the manner and method in which you received those documents, if you did?

A These documents are -- I think in one or two years they were hand delivered to me at the time at the nursing home, one year mailed to my residence.

Q By whom?

A By our Accounting Firm, Ernst & Ernst and -- they are a partnership return form for the years 1965, 1966 and 1967.

Q And were they delivered to you in just that form that they are marked as an exhibit here except for the markings put on by the Clerk?

A Yes.

Q And you tell us, Mr. Fahey, what did you do when you received each of those returns, particularly for the '65 and '67 years?

A Well, there were copies included also for the other partners.

Q Who distributed the copies to the other partners, if



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you know?

A I did, and there is instructions here to do several things, one to file the returns with the U. S. Government, that was one instruction and instructing us there is no tax due with the return, and instructing us what to transfer over to our individual 1040, our individual tax returns.

MR. SCACCIA: May I read that short paragraph to the jury?

THE COURT: Sure.

MR. SCACCIA: Reading from Exhibit B, Defendant's Exhibit B, a letter from Ernst & Ernst dated March 17, 1966 addressed to Mr. Thomas Fahey, 415 Stratford Street, Syracuse, New York: "Dear Mr. Fahey: We enclose in duplicate U. S. Partnership Return of Income of Walker McKinney Associates for the period from January 4, 1965 to December 31, 1965. The original should be signed and dated by a partner and forwarded to the Internal Revenue Service, Buffalo, New York 14202 in sufficient time to reach that office on or before April 15, 1966. The form marked 'Taxpayer's copy' is for your files. There is no tax return -- there is no tax due with this return. Each partner should include in his 1965 U. S. Individual Income Tax Return the loss

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shown the -- shown opposite his name in Schedule K column 4. A xerox copy for each of the partners entitled to a loss deduction is also enclosed. Very truly yours, Alan E. Boers, Manager," and then enclosures.

Defendant's Exhibit C, letterhead of Ernst & Ernst dated February 14, 1967 addressed to Mr. Thomas Fahey, Walker McKinney Associates, 205 Midtown Plaza, Syracuse, New York. "Dear Mr. Fahey We enclose in duplicate U. S. Partnership Return of Walker McKinney Associates for the year ended December 31, 1966. The original should be signed and dated by a partner and forwarded to the Internal Revenue Service, Buffalo, New York 14202 in sufficient time to reach that office on or about April 15, 1967. The form marked 'Taxpayer's Copy' is for your files. There is no tax due with this return. Each partner should include in his 1966 U. S. Individual Income Tax Return the amounts shown opposite his name and Schedule K, column 4. A xerox copy for each of the partners is also enclosed. Very truly yours, Alan E. Boers, Partner."

Defendant's Exhibit D is a letterhead of Ernst & Ernst dated April 2, 1968, addressed to Mr. Thomas E. Fahey, Castle Rest Nursing Home,



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116 East Castle Street, Syracuse, New York, 13205.

"Dear Mr. Fahey: We enclose in duplicate U. S. Partnership return of income of the Castle Rest Nursing Home for the year December 31, 1967. The original should be signed and dated by a partner and forwarded to the Internal Revenue Service, Buffalo, New York, 14202 in sufficient time to reach that office on or before April 15, 1968. The form marked 'Taxpayer's Copy' is for your files. There is no tax due with this return. Each partner should include in his 1967 U. S. Individual Income Tax Return the amount shown opposite his name and Schedule K column 4. The partner's attention is also called to lines 2 and 3 of Schedule K which indicates the basis of partnership property subject to investment credit computation on the respective returns. A xerox copy for each of the partners is also enclosed. Very truly yours, Alan E. Boers, Partner." I ask you Mr. Fahey as to just what did you do with those exhibits in the course of the preparation of your 1966 and 1967 income tax returns, tell the Court and jury?

A Well, in order to prepare my income tax return I got out all my doctor's receipts and W-2 forms for any wages that I had, my wife was employed during

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this period of time, her W-2 forms, all our substantiation on deductions and that kind of thing and these returns and I had them all laying out on the table, and I looked at the partnership return, I read the instructions and I did exactly what the instructions told me to do.

Q Now with respect to the 1966 return, taking Exhibit C, Defendant's Exhibit C, will you turn to the place marked Schedule K column 4? Do you find it sir?

A Yes, sir.

Q And can you read to the jury just what the entry is there?

A Well, for Walker McKinney 47 E. 8th Street, New York, column 4 says "loss \$12,875.50; Theodore Metzger 206 Fellows Avenue, Syracuse, blank, Thomas Fahey 415 Stratford Street, blank, George Simpson, M.D., 592 Park Avenue, East Orange, New Jersey, \$272.15 loss. Total in column four, loss \$15,147.65."

Q And with respect to Government's Exhibit 1, which is your 1966 income tax return, there is no question that your signature is on there and that is the return you prepared and filed with the Government, isn't that correct, sir?



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A That's correct, yes.

Q And now handing you Government Exhibit 2, your 1967 return, there is no question but that that is your return prepared and signed by you and filed with the Government, isn't that so?

A That's correct.

Q And with respect to the preparation of Government Exhibit 2, the 1967 return, will you tell the Court and Jury as to how you went about preparing it?

A Well, actually I did both these years together, I filed '66 and '67 in March or April.

Q Do I understand --

A (Interrupting) April 15, 1968 these are -- these were both filed together, so I had all these things laying out on the table together.

Q Would you explain that to the Court and jury, please, how was it you were preparing both the '66 and '67 income tax returns in or on April of 1968?

A Well because of all this confusion we had about the distribution of profits among the partners, and the changes we were going to make in the partnership agreement, there was just too much confusion at the end of '66, we weren't operational yet, we were opening our doors to business May 1, there was just

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so much confusion about our relative partnership interests that I didn't file it, I figures it would be better to wait until we resolved our negotiations that we were going through.

Q And then what if anything did you do with respect to the exhibit D, the Ernst & Ernst letter and partnership return in the course of preparation of your 1967 tax return?

A Well, the same as '66, they were both together, I read the instructions and I did exactly what the instructions told me.

Q Are the instructions the same for the year '67a as it was for 1966 insofar as you are concerned?

A There is a change in the information, those partners that had investment credit, but as far as mine is concerned, it is the same.

Q Would you then turn to the column 4 of Schedule K in that exhibit and read to the jury what it shows?

A It is even hard to find Schedule K -- Schedule K, column 4 -- well, I have to relate the names which are in column one to the amounts that appear opposite in column 4.

Q All right.

A Walker McKinney -- no, that is the investment credit, column 4 refers to Partner A, which is Walker



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McKinney, loss \$180,285.30; partner B, Theodore Metzger, blank;; Partner C, Thomas Fahey, blank; Partner D, George Simpson, M.D., \$31,815.06, total loss \$212,100.36.

Q And do you say, Mr. Fahey, that in the preparation of your 1966 and 1967 tax returns you followed specifically and to the letter the written instructions given to you in Exhibit C and D?

A Absolutely.

Q Now Mr. Fahey, I am going to ask you a very frank direct, blunt question, at any time did you intend in any way to defraud or cheat the Government in the preparation of the '66 or '67 tax returns?

A I did not.

Q You say that, because as you sit there under oath --

A (Interrutping) So help me God.

Q Now after the filing of those returns, Mr. Fahey, did there come a time when you were interviewed and contacted by members or representatives of the Internal Revenue Service with respect to those returns in your hands?

A Yes.

Q Can you recall when?

A Yes, in July of 1970 I got a telephone call from Mr. Wilton of the Internal Revenue Service.

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Q The gentleman seated at the counsel table with Mr. Welch here?

A Yes.

MR. WELCH: I would like to object to this line of questioning as irrelevant.

THE COURT: Sustained.

MR. SCACCIA: I have no further questions of this witness -- excuse me, I have one more question if I may, Judge. I forgot to ask you, Mr. Fahey, as to whether it was you who signed the partnership returns and filed those partnership returns with the Government, those exhibits?

A Yes, I did.

MR. SCACCIA: I have no further questions.

Thank you.

CROSS EXAMINATION BY MR. WELCH:

Q Now then, Mr. Fahey, I might hand to you Defendant's Exhibits C and D from which you were just testifying a moment ago. Would you tell the ladies and gentlemen of the jury -- well, first of all does that exhibit include with it a copy of the 1966 return and 1967 return of the partnership?

A Yes, it does, the partnership return that I filed with the Government.

Q Right. Now then, that letter, does it not state



Thomas M. Fahey, the Defendant, Cross.

that each partner should include in his '66 individual income tax return amounts shown opposite his name in Schedule K column 4?

A That's correct.

Q Does that letter say anything about column 6?

A No.

Q Does the letter as to 1967 say anything about column 6?

A No.

Q Would you direct your attention to the partnership return please?

A Which one?

Q Schedule K. Let's start with 1966, Schedule K, column 6, what is reflected in column 6 Schedule K in the 1966 partnership return?

A The heading of column 6 is "payments to partners, salaries and interest."

THE COURT: I am sorry but the jurors from back there can't hear what you are saying, it might be a very interesting tete-e-tete, but with you and Mr. Fahey and nobody else can hear it.

BY MR. WELCH:

Q I am sorry, keeping your voice up good and loud so all the ladies and gentlemen of the jury can hear you, you were telling the ladies and gentlemen

Thomas M. Fahey, the Defendant, Cross.

of the jury what is reflected in Schedule K  
column 6.

A Yes, Schedule K which is another section of Schedule  
K column 6, payments to partners, salaries and  
interest, line 14 page 1 -- you want me to go through  
the whole thing?

Q Well, on that column are there any figures listed?

THE COURT: This is cross examination, I think  
you can say -- you can save time and clarify the  
questioning if he -- if you lead the witness.

BY MR. WELCH:

Q Thank you, Your Honor. Mr. Fahey, isn't it true  
that in column 6 of Schedule K of that 1966 return  
there is a figure there and only one figure under  
that "payments to partners" "salary, interest,"  
that is after partner C, is that correct?

A Yes.

Q Which partner is partner C?

A That is me.

Q Now then that letter of instruction --

A (Interrupting) I am sorry, I made a mistake,  
it is stated again below, there is another figure  
in there.

Q In column 6?

A Yes, sir.



Thomas M. Fahey, the Defendant, Cross.

Q What is that figure?

A \$14,999.

Q All right, now next to your name what is the figure listed?

A \$14,999.

Q I am sorry, I didn't hear you.

A \$14,999.

THE COURT: That is listed as what? How is the item listed, how is it labeled?

THE WITNESS: Column 6?

MR. WELCH: Yes?

A "Payments to partners, salaries and interest.

THE COURT: It shows you receiving salary and interest in the amount of \$14,999, is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right. You understand that is your salary and interest in the partnership?

THE WITNESS: That's correct, sir.

THE COURT: All right.

BY MR. WELCH:

Q And at the time you prepared your individual income tax return in 1968 for the year 1966, you had that partnership return that you just referred to in front of you, isn't that correct?

A Yes, sir.

Thomas M. Fahey, the Defendant, Cross.

Q Now if you direct your attention to the next exhibit referring to the year 1967 please?

A Exhibit D.

Q Look at the partnership return schedule K, column 6, isn't column 6 --

A (Interrupting) I haven't been able to find it yet, there's about six pages.

Q I am sorry.

A I found it.

Q All right. Now directing your attention to column 6, not column 4 but column 6, is that also labeled "Payments to partners, salaries and interest"?

A Yes.

Q And isn't there a figure listed in there for only one partner?

A Yes, but it is listed twice.

Q But the figure is only as to you, isn't that correct?

A Yes.

Q How much is that figure paid to you by the partnership that year?

A \$11,666.62.

Q And did you have that partnership return in front of you when you prepared your individual income tax return for the year '67?

A I did.



Thomas M. Fahey, the Defendant, Cross.

Q Now Mr. Fahey, I hand you Government's Exhibit 19 in evidence which is the article of partnership of the partnership dated November 16, 1965, is that correct?

A That's correct.

Q Directing your attention to the last page of those articles, does that contain your signature?

A Yes.

Q Did you agree to these articles of partnership?

A I did.

Q I am directing your attention to Article 7 please, does that reflect that you are to be paid \$20,000 salary from the partnership?

A Yes.

Q Mr. Fahey, did you file amended returns for the year '67 and '66?

A No, I did not, I asked if I could --

Q (Interrupting) Please respond to the question, don't volunteer. Now Mr. Fahey, during the years 1966, 1967 or up until April 1968 when you filed those returns, at any time did you ever specifically ask Mr. Boers or Mr. Foody how you should treat column 6 on your own individual income tax returns?

A No.

Thomas M. Fahey, the Defendant, Cross.

Q Mr. Fahey, I am handing you what has been received in evidence as Government's Exhibit 25, which is the U. S. Partnership Return for the year 1968, and attached thereto is a copy of another transmittal letter signed by Mr. Boers who testified here yesterday, dated March 28, 1969 addressed to you. Have you seen that letter or the original of that letter?

A Yes.

Q Did you receive that letter?

A Yes, I did.

MR. WELCH: If Your Honor please, may I read the relevant portions of the exhibit?

THE COURT: Yes.

MR. WELCH: Addressed to Mr. Thomas Fahey:

"There is no tax due with this return. Each partner should include in the 1968 individual income tax return the amount shown opposite his name in Schedule K, column 4. Partner's attention is called to column 2 of Schedule K --" Now Mr. Fahey, did you have that transmittal letter from Mr. Boers when you prepared your 1968 individual tax return?

A I did.

Q Now Mr. Fahey, if I can first direct your attention to 1968 U. S. Partnership Return that was attached



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to that transmittal letter, Schedule K please?

A Schedule K?

Q Yes. Allright. Now I direct your attention to column 4 referred to in the transmittal letter, is there any figure listed after your name under losses in column 4?

A No.

Q Does it say none or zero?

A It says none -- oh, wait a minute, column 4, I am sorry, it says none after my name.

Q Now --

A (Interrupting) Pardon me, there were no losses that year.

Q May I ask the questions?

MR. SCACCIA: I object, if the witness wants to correct his testimony --

THE COURT: Well, it is not correcting it, it is volunteering. You can redirect.

BY MR. WELCH:

Q Now Mr. Fahey, if you would please, I direct your attention to column 6 of that Schedule K of that partnership return for 1963, is there a figure listed there after your name?

A There is.

Q And what is the labeling of column 6?

Thomas M. Fahey, the Defendant, Cross.

A Payments to partner, salaries and interest.

Q And how much does that return show you paid?

A \$21,000.

Q All right, if you will now take a look at exhibit 8 which I have just handed to you, Government's Exhibit 8, I just handed to you a second exhibit, Government's Exhibit 8 -- I am sorry, I am now handing you Exhibit No. 8, is not that your -- excuse, isn't that your 1968 individual income tax return?

A It is.

Q Did you prepare that return yourself?

A I did.

Q Now when you prepared that 1968 return did you have that transmittal letter from Mr. Boers that you just testified to?

A Yes.

Q Referring to the partnership return for '68?

A Yes, I did.

Q All right. I would like to direct your attention to Schedule B --

MR. SCACCIA: Excuse me, is that B?

MR. WELCH: B, part 3.

THE WITNESS: Yes.

BY MR. WELCH:



Thomas M. Fahey, the Defendant, Cross.

- Q    Isn't that labeled "Income or losses from partnership estates trusts and small business corporations"?
- A    It is.
- Q    And what figure do you list there?
- A    \$21,000.
- Q    Under what column?
- A    D.
- Q    That is the income column?
- A    Income or loss.
- Q    All right, does it have parenthesis around it or is it without the parenthesis?
- A    Without the parenthesis.
- Q    Does that indicate a loss or income?
- A    It indicates income.
- Q    All right, and what is the source of that income in 1968?
- A    Castle Rest Nursing Home.
- Q    So you reported the \$21,000 on the '68 individual return?
- A    That's correct, I reported \$21,000 income in the 1968 return with the Castle Rest Nursing Home as the source of income, yes.
- Q    Mr. Fahey, that 1968 return that you have just referred to, when did you sign that return?
- A    May I look at it?

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Q Yes.

A April 15, 1969.

Q Did you file it shortly thereafter?

A I would assume I filed it the same day.

Q Now in that return in which you included \$21,000 income from Castle Rest, you signed that April 15, 1969, is that correct?

A That's right.

Q Now you heard testimony yesterday from Mr. Laura Post who audited your '67 return in June '69, is that not correct?

A I don't recall what she said, but if that is what it was I will accept it.

Q Do you recall the audit being any other time than June '69?

A No.

Q And did you tell Mrs. Post about your income from the Castle Rest Nursing Home?

A I had no income from the Castle Rest Nursing Home, not in those years.

THE COURT: Do I understand you, Mr. Fahey, to say that you did not receive the \$14,999 from this partnership in 1966?

THE WITNESS: No, sir, I received it but it was not taxable income.



Thomas M. Fahey, the Defendant, Cross.

BY MR. WELCH:

Q Mr. Fahey --

A (Interrupting) Because the partners had agreed they would be draws.

THE COURT: You received the money?

THE WITNESS: Yes, sir.

THE COURT: But you say you received it against your partnership share as a draw against --

THE WITNESS: (Interrupting) Future profits, yes, sir.

THE COURT: And that is also your position with respect to the next year?

THE WITNESS: Yes, sir.

BY MR. WELCH:

Q Mr. Fahey, did you testify that it was your understanding that Dr. Simpson and Mr. McKinney would be receiving draws against future partnership shares in the years '66 and '67?

A Yes.

Q All right, if you will take a look at the two exhibits I have just handed you and show the ladies and gentlemen where on the U. S. Partnership Return File for '66 and '67 Dr. Simpson and Mr. McKinney's draws against the partnership are reported as is yours.

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MR. SCACCIA: I am sorry, I have trouble following that question.

BY MR. WELCH:

Q Perhaps I can rephrase it --

THE COURT: Rephrase.

BY MR. WELCH:

Q Your contention apparently is that the income you received from the partnership was something called a draw from the partnership, is that correct?

A That's correct.

Q And you just testified that Dr. Simpson and Mr. McKinney also received such draws, is that correct?

A That's correct.

Q What you contend is a draw is reported on those two partnership returns, is that correct?

A Yes.

Q Where on those partnership returns are Dr. McKinney's reports of those draws?

A In Schedule M.

Q Well perhaps you could point out to me where on Schedule M it is.

A Which year did you want?

Q Let's start with 1966.

A It is included in all these figures, I don't know the specific amount but it is included within the



Thomas M. Fahey, the Defendant, Cross.

figures in that entire schedule.

Q Is that the same for the 1967 return, that it is included in Schedule M?

A I will check, I will have to check, because they changed these returns during these years, too.

MR. SCACCIA: I have having difficulty, counsel, perhaps if you would step back.

BY MR. WELCH:

Q Where in the 1967 return are Dr. Simpson's and Mr. McKinney's draws?

A In Schedule M.

Q But yours is in Schedule K, is that your testimony?

A Schedule K, column 6.

Q Now Mr. Fahey, you heard testimony yesterday from Mr. Boers concerning FICA or Social Security withholding having been withheld from your 1966 partnership salary?

A Yes, I did.

Q Is it true that the partnership did initially hold some amounts of FICA withholding?

A That's correct.

Q Is it true that you filed a claim in behalf of the partnership for the return of that FICA withholding?

A I don't recall whether I filed it or Mr. Boers did. He prepared it, I may have filed it.

Thomas M. Fahey, the Defendant, Cross.

Q Mr. Fahey, I am handing you Government's Exhibit 26 in evidence which you did examine yesterday before it was moved into evidence, isn't that the pencilled copy or the accountant's rough draft or draft of the claim for refund of the FICA?

A That's correct, yes.

Q Now isn't it true you stipulated yesterday that you did in fact sign and file that 843?

A I don't know, Mr. Scaccia handled those things with you and I am not sure.

MR. WELCH: May I have this marked as a Government's Exhibit?

(A document marked Government's Exhibit 27 for identification.)

Q Mr. Fahey, I hand you what has been marked Government's Exhibit 27 for identification which appears to be correspondence between you and the Internal Revenue Service concerning a form 843. Now if I can direct your attention to the photocopy attached to this exhibit and ask you to examine that for a moment?

A May I read the entire exhibit so I know what I am talking about?

Q Surely.

A Did you want me to refer to the last page of this?



Thomas M. Fahey, the Defendant, Cross.

Q Have you had an opportunity to read the whole exhibit?

A Yes.

Q Referring to the last page attached thereto, what appears to be a photocopy of an original document marked "Taxpayer's Copy" is that a photocopy of your signature?

A Yes.

Q All right, so then did you sign an 843 claim for refund?

A This refers to both FICA and income tax withholding, this letter.

Q The first letter refers to FICA and income tax withholding?

A It was erroneously withheld, yes.

Q Form 843 refers to the FICA, is that correct?

A Pardon me?

Q The last form 843, does that refer to the FICA, the Social Security?

A Yes.

Q Did you file that with the Internal Revenue Service?

A I did.

MR. WELCH: If Your Honor please, may I move that into evidence?

MR. SCACCIA: I have no objection.

Thomas M. Fahey, the Defendant, Cross.

THE COURT: Received.

(Government's Exhibit 27 marked in evidence.)

BY MR. WELCH:

Q Now Mr. Fahey will you tell the ladies and gentlemen of the jury whether or not the partnership was ever repaid that initial FICA withholding?

A I can't tell from this, but to the best of my recollection, yes, the partnership was refunded the withholding.

Q Now if you will tell the ladies and gentlemen of the jury, the claim is for what amount, the claim for refund?

A The claim for refund is \$554.40.

Q And in the rest of the form does it indicate part of that is something to the partnership and part to the employee, Mr. Thomas Fahey?

A It doesn't say employee, can I read it?

Q I have no objection.

A "The partnership erroneously withheld FICA tax from the salary of Thomas Fahey, a bona fide partner in the firm in the amount of \$277.20. Remitted with such sum was a matching contribution of \$277.20. Forms 941 were filed for the quarters ending June 30, '66 and September 30, '66. Since the partner is required to and must pay a self employment tax



Thomas M. Fahey, the Defendant, Cross.

refund of the erroneous amount of \$554.20 is requested." The covering letter says that the FICA was erroneously withheld from draws of a partner and erroneously deposited.

Q That money was withheld by the partnership, the \$277, the rest by the taxpayer?

A No, the partnership paid the entire amount and withheld \$277. from me erroneously.

Q So that half of that claimed refund is the partnership's?

A That's correct.

Q Now in addition it says here --then you just read that since the partner is required and will pay self employment tax, refund of the \$554.40 is requested, isn't that what it says there?

A Yes.

Q Isn't that your signature on that form?

A That's right.

Q Well how, Mr. Fahey, did you -- there is also a claim claiming erroneously withheld income tax?

A That's right.

Q Do you know how much was erroneously withheld in 1966?

A I don't recall, I think it was around \$1,060, something in the neighborhood of \$1,000.

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Q Let me ask you, did you hear Mr. Boers say yesterday concerning the preparation -- did you hear him testify concerning the preparation of a W-3 for the claim for that withholding?

A That was no claim for any withholding.

Q Did you hear Mr. Boers testify that he had prepared one for you?

A But he didn't testify it was a claim for any withholding for any refund.

Q Let me ask you this, you recall Mr. Boers testifying about preparing a form W-3 for you?

A Yes, I do.

MR. SCACCIA: I am going to object, I think he is going far afield on cross examination on matters that really are the jury's province as to --

THE COURT: I sustain that on the last question. Strike it, it is argumentative.

BY MR. WELCH:

Q Mr. Fahey, did you ever file a claim for the return of that Federal withholding?

A You know, I frankly don't remember whether I ever did or not, I just don't, there is no way to do it --

Q (Interrupting) Well --

A (Interrupting) There is no refund claim form, I frankly today don't know whether in any subsequent



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tax returns that amount --

Q (Interrupting) I asked if you recall ever filing the claim for the refund?

A I am trying to answer your question to the best of my memory.

Q Did you file such a claim?

A No, I don't know, I think I may have in my subsequent tax returns, I think I may have, the trouble is there is no claim form.

Q All right, thank you, Mr. Fahey. Now Mr. Fahey in 1964 through 1966 were you receiving payments from the Culotti Construction Company, salary, income, whatever?

A I was an employee of the Culotti Construction Corporation, yes.

Q Thank you. You recall when you went off the payroll of Culotti Construction Company in 1966?

A No, not without refreshing my recollection, no.

(Counsel hands document to witness.)

A Apparently I was. Do you want me to answer?

Q If you know when you were -- how long were you on the payroll of the Culotti Construction Company in 1966?

A Well, it appears from this, and this is their payroll record, that I was there from January '66

Thomas M. Fahey, the Defendant, Cross.

through September 7, '66.

Q To September 7, 1966?

A That is correct.

Q Now you testified earlier that you were on the payroll of Culotti Construction Company until such time as the development of the Nursing Home had been completed, is that correct?

A Pardon me, could you repeat that, I didn't get the question.

Q If I recall erroneously I would appreciate your telling me. You testified yesterday you were on the payroll of the Culotti Construction Company until the completion or the development of the Nursing Home, is that correct?

A No, I don't think that is correct, I was on and off on a couple of occasions. I don't recall why I -- I don't recall what I testified to yesterday on that score.

Q Now Mr. Fahey, were you on the payroll of the Culotti Construction Company in 1967?

A I believe so, if I could have those payroll reports.

Q I will hand you Exhibit 13, which is the W-2.

A I was.

Q And how much were you paid by Culotti Construction in 1967?



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A \$8,330.

THE COURT: We will take a short recess.

(Thereupon a short recess was taken after which the hearing was resumed.)

THE COURT: All right, proceed.

BY MR. WELCH:

Q Now Mr. Fahey before the recess I had asked you how much you had earned from the Culotti Construction Company in 1967?

A \$8,330.

Q Now I would like to direct your attention to Government's Exhibit 6, the 1967 U. S. Partnership Return of income for the Castle Rest Nursing Home, and direct your attention to Column 6, payments to partners, salaries and interest, what is that figure?

A \$11,666.62.

Q And that was the amount paid to you by the partnership, the nursing home in 1967?

A That's correct.

Q Now if you would please, what is the total of those two figures from the Culotti and also the nursing home?

MR. SCACCIA: I object to that, Your Honor, I think everybody could do the mathematics.

Thomas M. Fahey, the Defendant, Cross.

THE COURT: I would think counsel could do it.

Isn't it the total?

BY MR. WELCH:

Q Would it be fair to say \$19,900?

A I haven't had a chance to do the arithmetic, Mr. Welch.

THE COURT: Oh brother, you do the arithmetic, you are cross examining.

BY MR. WELCH:

Q I have done the arithmetic and the total is \$19,096.62, -- 992.62.

A O.K.

Q Now Mr. Fahey, in the articles of partnership November 16, 1965, what was the total salary you were guaranteed from the partnership?

MR. SCACCIA: I object to that as an improper characterization.

THE COURT: The document speaks for itself.

BY MR. WELCH:

Q Isn't that correct, you agreed in that Article 7 you would receive \$20,000 as salary from the --

MR. SCACCIA: I think the document speaks for itself.

THE COURT: The document speaks for itself. If you want to read it to the jury, Article 7, you



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may do so.

MR. WELCH: Article 7 of the Article of Partnership dated November 16, 1965, Article 7.1, Thomas Fahey or his successor As Administrator shall be paid a salary of \$20,000 per year, which salary may be drawn by him in monthly installments. Such salary for purposes of division of partnership shall be treated as an expense of the partnership, and it was so treated, wasn't it?

A Yes, sir.

THE COURT: Deduct it as an expense?

THE WITNESS: No, sir, I did not get the \$20,000.

THE COURT: Would you show him Exhibit D?

MR. WELCH: That is the '65 --

THE COURT: All right, C, then. Arent the payments to you by the partnership taken as a business deduction?

THE WITNESS: Yes, sir.

THE COURT: Then that was also true in the following year?

THE WITNESS: Yes, sir, but he was referring to \$20,000 and it was not those figures.

By MR. WELCH:

C Mr. Fahey, showing you Exhibit 2 which is in

Thomas M. Fahey, the Defendant, Cross.

evidence, did you sign that financial statement?

A I did.

Q That reflects your income as of January 1, 1968-- does that reflect your financial condition as of January 1, 1968?

A Yes, sir.

Q And in part Y it says annual income due, it lists salary \$20,000.

A I did not list salary.

Q Doesn't it say \$20,000 on the exhibit?

MR. SCACCIA: I object, Your Honor, I think the instrument speaks for itself.

THE COURT: No, I think there is a question of intent here. Let him answer. Is that what you said?

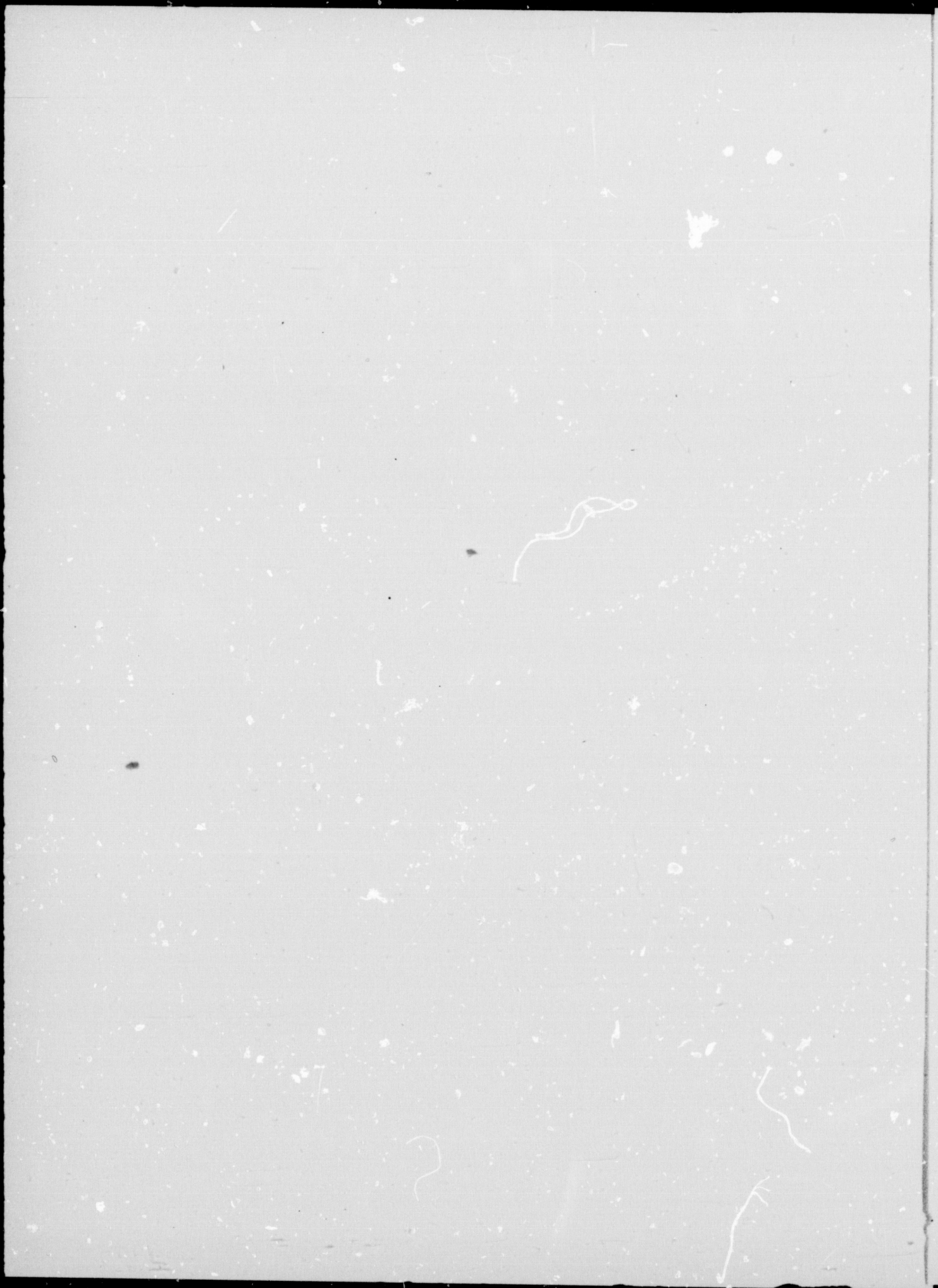
THE WITNESS: Yes, sir.

THE COURT: You don't show, I don't see any debts to the partnership, are there?

THE WITNESS: No, sir, I was not entitled to any partnership losses.

THE COURT: Then I take it you don't contend here or claim these payments which you received from the partnership in the year '66 and '67 were debts which you owed the partnership, since the partnership received no profits.





Thomas M. Fahey, the Defendant, Cross.

A That's correct, they would be applied against future profits when we made profits.

THE COURT: That is a debt, isn't it?

THE WITNESS: I never thought of it in those terms.

THE COURT: Didn't you study business administration?

THE WITNESS: No, sir, I never took any accounting at all, sir.

THE COURT: Could you show me in any of these agreements here where there is an arrangement that payments to you are to be a draw against your share of the profits?

THE WITNESS: No, sir, it was in the subsequent agreements that we entered into in 1967.

THE COURT: But no agreement prior to this time?

THE WITNESS: Oh yes, it got into writing in '67, but we did agree much earlier.

THE COURT: Orally?

THE WITNESS: Yes.

THE COURT: But you never treated it that way, did you?

THE WITNESS: I never -- I didn't handle the accounting, I don't know how that was handled, I



Thomas M. Fahey, the Defendant, Cross.  
know now but I didn't know at the time.

THE COURT: Werent the entire losses in the years '66 and '67 to the partnership allocated to two partners other than you?

THE WITNESS: The losses, yes, sir.

THE COURT: The entire losses.

THE WITNESS: Yes, sir.

THE COURT: All of them?

THE WITNESS: Yes, sir.

BY MR. WELCH:

Q No losses were allocated to you in those years '66 and '67?

A In the way it was handled, right, that was the subject of a long litigation.

Q Did you sign the U.S. Partnership for those years as true and correct?

A The partnership return?

Q Yes, sir.

A Yes, sir, prepared by Ernst & Ernst.

Q Do you recall writing to Mr. Walker McKinney in 1966?

A Pardon me?

Q Do you recall writing to Mr. Walker McKinney and asking him to make a further payment into the capital account so you could start getting your

Thomas M. Fahey, the Defendant, Cross.

salary from the nursing home instead of the Culotti Construction Company?

A I don't recall, but it may have been.

(A document marked Government's Exhibit 28 for identification.)

Q I hand you what has been marked as Government's Exhibit 28 for identification, does that purport to be a letter addressed to "Dear Walker" and signed by "Tom"?

A Right.

Q Is that your signature?

A That's right.

MR. WELCH: If Your Honor please, I move this in evidence.

MR. SCACCIA: May I have an opportunity to look at it please?

(Document handed to counsel.)

MR. SCACCIA: I would object, Your Honor, I think it is incompetent, irrelevant, immaterial.

THE COURT: Did you contribute anything to it?

THE WITNESS: There was a bank loan that I guaranteed to the partnership of \$150,000, and I guaranteed it, a fourth of that, in that sense, yes.

THE COURT: But any of your own money, did you have a capital account?



Thomas M. Fahey, the Defendant, Cross.

A No, sir.

THE COURT: Did you have a capital account at the time you filed your 1966 and your 1967 individual income tax?

THE WITNESS: No, sir.

THE COURT: Did you have it at the time the partnership information returns were filed for those years, any capital account?

THE WITNESS: No, sir, but in our subsequent litigation I got legal advice --

THE COURT: No, just answer my question.  
Overruled.

(Government's Exhibit 28 marked in evidence.)

BY MR. WELCH:

Q Mr. Fahey, if you would direct your attention to Government's Exhibit No. 28 just received into evidence, particularly the paragraph on the bottom of the first page and top of the second page, would you read those to yourself?

A May I read the whole letter?

Q Surely.

A It is so long ago, what particular paragraphs did you want?

Q The question I had asked you before I got into that letter was simply do you recall writing to

Thomas M. Fahey, the Defendant, Cross.

Mr. Walker McKinney in April of 1966 asking him, Mr. McKinney to make a payment into his capital account so that you could start getting your salary from the partnership instead of Culotti, yes or no, do you recall that?

A Yes, I do now.

Q Now Mr. Fahey, what was the monthly check you were receiving from the Culotti Construction Company?

MR. SCACCIA: Can we have a period of time?

BY MR. WELCH:

Q In 1967 what was the monthly check you were receiving from Culotti Construction Company, what was the amount?

A It varies, \$1500 --

Q What was the gross pay you were receiving from Culotti Construction Company?

A \$1666.

Q And that was for the period January through May 10, 1967?

A Yes.

Q All right. Is it not so that you also began receiving in May of '67 or June of '67 monthly checks of \$1,666 from the Castle Rest Nursing Home?

A I think so.

Q Now did you testify to something earlier about



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there being something about depreciation in these earlier agreements, the written agreements?

A I testified that I was entitled to 45% of the depreciation.

Q The question is is it in the earlier written agreements?

A Yes.

Q Would you show it to us please?

MR. SCACCIA: May we have an identification as to what document the witness now has?

THE WITNESS: It is not in this one.

BY MR. WELCH:

Q I have just showed you Defendant's Exhibit F and your answer is it is not in this one.

A That is right, it is in the limited partnership agreement.

Q Isn't Defendant's Exhibit F dated the 4th of January 1965, didn't you testify that was the limited partnership agreement?

A I am sorry, I misread the document you just gave to me, that's correct.

Q Show us where the depreciation is taken care of?

A Where it is taken care of?

Q Where you say you are entitled to some depreciation.

A It is silent on depreciation.

Thomas M. Fahey, the Defendant, Redirect.

MR. WELCH: Thank you very much. I have no further questions. Thank you, Your Honor.

REDIRECT EXAMINATION BY MR. SCACCIA:

Q Mr. Fahey, I want to pick up that point where counsel handed you Exhibit F, and I will hand you all three of the agreements. I will hand you all three agreements, E and F of the Defendant's and Government's Exhibit 19, and isn't it correct Mr. Fahey that at the very beginning, i.e., the 1964 date as evidenced by the memorandum of understanding Exhibit E, that you were entitled to 45% of the -- that you had a 45% interest?

MR. WELCH: If Your Honor please, may we have a proper phrasing of the question? 45% interest in what?

THE COURT: Sustained. The document speaks for itself.

MR. SCACCIA: Yes, I was going on to another matter.

BY MR. SCACCIA:

Q Mr. Fahey, will you tell the Court and jury what the basis upon which you claim, if you do, any depreciation?

A In relation to these specific documents?

Q You tell us the basis.



Thomas M. Fahey, the Defendant, Redirect.

A When we started this partnership agreement on this I had a 45% interest in the partnership, 45% interest in the partnership is 45% of the profits, and as my understanding then and ever since then has been, as has been confirmed by lawyers since then, that when an agreement is silent on a matter of making a distinction about depreciation, all the partners share the depreciation in accordance with their interest in the partnership, absent any provision allocating the depreciation differently. Partners can agree to allocate depreciation specifically, and if they agree to do it, that is all right, that did not occur in our first or second agreement. There was a specific allocation of depreciation in the third agreement.

Q Government Exhibit 19?

A Yes, that was the bone of contention that I testified to earlier, there was a change in the depreciation from my getting 45% of it in this last agreement. As it is written I was to get none of it, and that changed the depreciation.

Q And what if anything resulted from that bone of contention that you tell us about?

A Well, we had some problems over it and we were negotiating change in this agreement for that and

Thomas M. Fahey, the Defendant, Redirect.

other reasons.

Q And did litigation ultimately ensue between the partners thereafter?

A It sure did.

MR. WELCH: Objection, Your Honor.

THE COURT: All right, let the answer stand.

BY MR. SCACCIA:

Q And did that litigation take the form of arbitration proceedings?

A It did.

MR. WELCH: Objection, Your Honor.

THE COURT: Yes.

BY MR. SCACCIA:

Q Now taking your attention to January '68, Mr. Fahey, do you recall a discussion with Walker McKinney and William Murray as lawyer with respect to a proposal being made by them at a time when partners were making various claims?

A Yes, sir.

Q Would you tell the Court and jury about that, what happened in that?

A There were three meetings among the partners on that point --

MR. WELCH: If Your Honor please, I renew my objection, this is all irrelevant to the years in



Thomas M. Fahey, the Defendant, Redirect.

question.

THE COURT: I think you are also just going back over your direct examination, it is repetitive, isn't it?

MR. SCACCIA: I am trying to explain away --

THE COURT: I don't care what you are trying to do, it seems to me it is repetitive of what he testified to a few moments ago on direct.

MR. SCACCIA: No, this is new matter to clear up matters that came up on cross.

THE COURT: They don't to -- they don't seem to meet -- to me to be. I will allow you to go ahead aways.

THE WITNESS: Yes, there were the three meetings in January of that year and a proposal was made by Mr. McKinney and his attorney Mr. Murray to scrap this partnership agreement.

BY MR. SCACCIA:

Q Referring to 19?

A Referring to 19, and that we would forget about all the distributions in Article 7, the distributions of profits, Article 8 the special allocations of depreciation and losses, and that we would enter into a new partnership agreement in which we would go back to our original intent where we split it on a straight

Thomas M. Fahey, the Defendant, Redirect.

percentage basis, and they made a specific proposal to me they would have 80% of the partnership and I would have 20.

THE COURT: This was in 1968?

THE WITNESS: Yes, sir.

THE COURT: After these tax returns were filed?

THE WITNESS: No, sir, before the tax returns were filed.

THE COURT: But they happened after the taxable years, is what I am getting at?

MR. SCACCIA: Yes, after the taxable years.

THE WITNESS: Just before they were filed.

BY MR. SCACCIA:

Q And did that --

A That would have necessitated going backwards and amending the partnership and the individual tax returns of all the partners back in '65 if that change had been given effect, the partnership returns would have had to have been amended.

Q Were they formally amended?

A The negotiations eventually broke down and we got into litigation over it.

Q And isn't it a fact that that litigation resulted in an arbitration award in your favor?



Thomas M. Fahey, the Defendant, Redirect.

MR. WELCH: Objection, Your Honor.

THE WITNESS: Yes, sir.

THE COURT: Repeat the question.

(The Reporter read back the last question as above recorded.)

THE COURT: Overruled.

BY MR. SCACCIA:

Q Would you tell the Court and jury what the nature of the award was and when it was handed down?

A It was handed down -- well, the nature of the award was Mr. McKinney attempted to expell me from the partnership without any compensation. The arbitration went on for several months, and the award of the arbitration -- the arbitrators awarded me \$175,000 for my partnership interest, and they said any payments I had received in the interim period of time during my compensation as Administrator during the period of the arbitration would be off set against that award.

Q That was specifically set forth, was it not?

A Yes.

MR. SCACCIA: No further questions.

MR. WELCH: I have no further questions.

THE COURT: You are excused. Next witness.

MR. SCACCIA: The defense calls Mr. Baxy

Barry J. Gravante for Defendant, Direct.

**BARRY J. GRAVANTE**

called as a witness on behalf of the Defendant  
being first duly sworn was examined and testified  
as follows:

**DIRECT EXAMINATION BY MR. SCACCIA:**

- Q Mr. Gravante, would you speak up in a tone so that the farthest jurors can hear you and state your name and address?
- A My name is Barry J. Gravante, I live at 106 Meadow Lane, North Syracuse, New York.
- Q What is your professional occupation sir?
- A I am a Certified Public Accountant.
- Q And would you state your higher education and qualifications and your experience in your profession?
- A Well, I graduated from LaMoyne College with a Bachelor's Degree in 1961, joined a firm called Scovell, Wellington and Company in early 1962, a Certified Public Accountant firm. It merged into a larger Certified Public Accounting Company at the end of '62. I was with them until approximately December of '67 when I went out on my own in a partnership, accounting partnership called Blum and Gravante. I received my certificate as a Certified Public Accountant in March of 1966.



Barry J. Gravante for Defendant, Direct.

Q And would you briefly describe your duties as a Certified Public Accountant?

A General duties?

Q Yes.

A Well, basically you are called upon to audit financial statements, to prepare all sorts of income tax returns, partnership, corporation, individual income tax returns for businesses, for individuals, other types of tax advice returns, give instructions regarding how to prepare returns, I could go on and on.

Q Have you had experience especially in those areas?

A I certainly have.

Q Over the years you testified?

A Yes, sir, I have.

Q And have you been retained on behalf of the defendant Thomas Fahey as an independent Certified Public Accountant with respect to aiding the defense of this case?

A Yes, I have.

Q Mr. Gravante, would you tell the Court and jury as I hand you Exhibits 1 and 2, Government's Exhibits 1 and 2, together with Defendant's Exhibits C and d, they being the 1966 and 1967 tax returns prepared and filed by the defendant Thomas Fahey,

Barry J. Gravante for Defendant, Direct.

together with the partnership returns prepared by Ernst & Ernst for those years, together with letters of transmittal, do you have all those before you?

A Yes.

Q Would you tell the Court and jury as to whether you have an opinion concerning the preparation and computation of the Federal Partnership Tax Return?

A Preparation of the Partnership Tax Return?

Q Yes.

A Well, based on testimony heard in this Court room by Walker McKinney, all draws or payments to all partners, it was decided in September of 1967, I believe, that all payments to all partners were to be considered draws. Now based on that I would say -- and that also was the testimony of Mr. Fahey, as I recall. Based on that I would say that it was incorrect to have any partners salaries shown in Schedule K, column 6.

THE COURT: Wasn't the salary taken as a business deduction by the partnership, isn't that the way you treat all salaries instead of a draw?

THE WITNESS: If it is a salary, yes.

THE COURT: Was it taken that way? Are you saying they can have it both ways?

THE WITNESS: I am saying there was a subsequent



Barry J. Gravante for Defendant, Direct.

agreement, from what I understand.

THE COURT: Subsequent agreement?

THE WITNESS: In September of 1967, whereby the partners agreed that all payments would not be salaries, these would be draws. I believe Mr. McKinney testified to that.

THE COURT: Was there ever any redistribution in the documents you have seen of the losses?

THE WITNESS: No, I don't see a change with respect to losses, Your Honor.

THE COURT: So that the other three partners got the benefit of those losses?

THE WITNESS: Yes, they did, Your Honor, according to this return.

THE COURT: And also the benefit of a business deduction?

THE WITNESS: With respect to the losses, yes Your Honor.

THE COURT: No, with respect to Mr. Fahey's "salary"?

THE WITNESS: Yes that is true.

THE COURT: All right.

BY MR. SCACCIA:

Q And would you tell the Court and jury Mr. Gravante how in your opinion the matter should properly be

Barry J. Gravante for Defendant, Direct.

handled, given the agreement of September '67, with respect to the handling of payments --

MR. WELCH: Object to the characterization in the question. I believe he is testifying on the basis of some oral statement of Mr. McKinney.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Mr. Gravante, if you would go on and tell us what your opinion is, if you have one, with respect to the difficulty involved in the preparation of the partnership tax return.

A Well, the partnership tax return, there is many elements to it that you don't find with corporations, with individuals, especially to respect to how income is to transferred to the individual income tax return. My own opinion is that it certainly requires on the part of the accountant or the part of the one transmitting such returns, that the individual be instructed as to where he is to find the various elements of income to pick up on his return. If you look at the return you will see there are all sorts of different ways to handle various items of income. In some cases dividends are reported by the partnership, in other cases the individual picks up dividend income. Capital gains are handled differently



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with respect --

THE COURT: Let's take the two we have got here, where is any income for any partnership in '66 or '67?

THE WITNESS: If I am to take the returns themselves, the income is shown in column 4, it shows losses in 1966, and the return shows partner's salaries as was said before.

THE COURT: It doesn't show any partnership income in either year, does it?

THE WITNESS: No, it doesn't Your Honor.

THE COURT: I didn't think so.

BY MR. SCACCIA:

Q So those are loss years, correct?

A Yes.

Q For the partnership as a whole?

A Yes, they are.

Q And given that will you--

THE COURT: Wait a minute. You said as a partnership as a whole, that isn't so, is it? As per those returns?

THE WITNESS: Yes, there are losses for the partnership as a whole.

THE COURT: Are any of those allocated to this defendant?

Barry J. Gravante for Defendant, Direct.

THE WITNESS: No, they are not, Your Honor.

THE COURT: Both are taken totally by two partners, aren't they?

THE WITNESS: Right, correct.

THE COURT: And there is no charge to this defendant's capital account, he is not given any minus figure against future profits, is he?

THE WITNESS: No, there is no charge to his capital account on the return.

THE COURT: Was there ever such a charge? I take it you have studied these?

THE WITNESS: On these returns?

THE COURT: In preparation for this case, was there ever such a charge?

THE WITNESS: Subsequent to this?

THE COURT: Yes.

THE WITNESS: I don't recall there being, no, Your Honor, but I don't recall the later returns in '71 and '72, I would have to see those.

THE COURT: Do you want to get them? Do you have them here?

MR. SCACCIA: Partnership returns? If I may say, those were litigation years and --

THE COURT: Have you got them? I want to know if there was such a charge.



Barry J. Gravante for Defendant, Direct.

MR. SCACCIA: I don't think we have them, they were not in our possession, never been in our possession, Your Honor. I was going to suggest --

THE COURT: As you recall them?

THE WITNESS: I don't recall seeing them, I wanted to see them before I answered, Your Honor.

THE COURT: All right.

MR. SCACCIA: I am only speaking from knowledge given me by Mr. Boers yesterday, that he stated that they decided from handling the returns in the '71-'72 years, because of the litigation, I don't know who handled it.

THE COURT: Go ahead.

BY MR. SCACCIA:

Q And Mr. Gravante, go on now and would you tell the Court and jury what in your opinion is the proper manner that an accountant, Certified Public Accountant, should go about instructing a taxpayer in the 1966 and 1967 years involved here?

A Yes, in my opinion because of the nature and the complicated -- because a partnership return is more complicated than other types of returns, for even -- for instance, a corporate return, a corporate return the stockholder-owner if he works for that corporation --

Barry J. Gravante for Defendant, Direct.

THE COURT: I think this only confuses. Stick to the issue that we have here. We are not concerned with corporations.

THE WITNESS: Well, Your Honor.

THE COURT: Please.

THE WITNESS: O.K.

THE COURT: I am directing counsel.

BY MR. SCACCIA:

Q Mr. Gravante --

A (Interrupting) There is no one place --

Q I just want you to answer the next question. Given the 1966 and 1967 personal income tax returns filed by Mr. Fahey in your hands and as against the C & D, the partnership returns prepared by Ernst & Ernst, together with letters of transmittal, would you comment as to whether or not in simple terms Thomas Fahey accurately prepared his return insofar as the partnership items are concerned furnished by Ernst & Ernst?

A Well, I would say that based on testimony heard in this Court he accurately prepared his return.

Q Why do you say that?

A Because testimony in this Court was that all payments as of September or -- that the agreement in September of '67 between the partners was that all



Barry J. Gravante for Defendant, Direct.

payments -- this was Walker McKinney saying this now -- that all payments to partners were to be draws. Now if they are draws they are not taxable income. A draw can be made even though you are drawing your capital account in to a negative balance.

THE COURT: Is there a negative balance anywhere here?

THE WITNESS: No, there isn't Your Honor.

THE COURT: Would you conclude as an accountant from the fact that there is no negative balance, no charge to capital accounts, that these were not treated as draws?

THE WITNESS: By the accountant, yes, I would conclude that.

THE COURT: By the partnership, they were so signed.

THE WITNESS: Apparently, Your Honor, I have to answer that by the accountant's, they prepared the return.

THE COURT: Well, the partnership signed it.

THE WITNESS: O.K.

THE COURT: Mr. Fahey did.

THE WITNESS: Yes, Your Honor.

THE COURT: Are you telling us as an

Barry J. Gravante for Defendant, Direct.

accountant they were not treated as salaries?

THE WITNESS: No, I am not telling you that.

THE COURT: I didn't think so.

BY MR. SCACCIA:

Q And in your expert opinion, given the directions contained in C and D in your hands, did Thomas Fahey correctly follow the instructions given in C and D by the Certified Public Accountants so far as handling those items? Handling those items in his personal income tax returns?

A He most certainly did follow the instructions.

Q Is it fair to say he followed it right to the letter?

A It is fair to say that.

Q And can you state and in your opinion as to whether Ernst & Ernst should have given any other instructions to the taxpayer, if there was to be any other interpretation other than as made by Mr. Thomas Fahey?

A I most certainly feel that having taken the obligation upon themselves to give any instructions with respect to what income the individual should pick up from his partnership, if they intended for him to pick up column 6 they should have so stated.

Q In simple terms, they should have said so?

A Yes. They made a mistake in this letter of



Barry J. Gravante for Defendant, Cross.

transmittal as far as I can see.

MR. SCACCIA: I have no further questions.

CROSS EXAMINATION BY MR. WELCH:

Q In your hands do you have the U. S. Partnership returns for '66 and '67 of Castle Rest Nursing Home?

A It says Walker McKinney Associates, but it is one and the same, yes.

Q I would like to direct your attention to Schedule K?

AW Which return?

Q In both returns.

A All right.

Q All right. Now Mr. Gravante, in your expert opinion would you direct your attention to Schedule K on the partnership return filed by Thomas Fahey, column 6, doesn't it show a salary to Mr. Thomas Fahey for '66 and '67?

MR. SCACCIA: I object. May I state it? I think he characterized as partnership return prepared by Thomas Fahey.

BY MR. WELCH:

Q Filed by Thomas Fahey.

A According to what I understand, it was mailed in by him.

Q Did you hear the testimony here?

A Yes.

Barry J. Gravante for Defendant, Cross.

Q Directing your attention to column 6K, would you give us your explanation as to whether or not it is reportable income as reported on the partnership return?

A As reported on the partnership return it would have been, if the partnership return is correct.

Q Please answer the question.

A Yes.

THE COURT: On its face, isn't it reportable income?

THE WITNESS: On its face it is.

THE COURT: Both years?

THE WITNESS: Yes, it is, Your Honor. But can I make that on its face from Schedule K.

BY MR. WELCH:

Q Schedule K, column 6.

A Yes, it would be just on the first of these returns.

Q Now in your expert opinion is a salary paid to a partner treated as an expense, a deductible expense of the partnership?

A You are getting into something a lot deeper than that.

THE COURT: That is not so deep. Can you answer the question?

THE WITNESS: It is a question if it is



Barry J. Gravante for Defendant, Cross.

determined in a partnership agreement by all partners to be a salary paid to the partners, it is deducted as a partnership expense.

THE COURT: Wasn't this deducted as a partnership expense?

THE WITNESS: Yes, it was, Your Honor.

BY MR. WELCH:

Q Were any payments to the other partners in those tax returns deducted as expenses, Mr. Gravante?

A Not that were deducted as expenses, no.

Q Now Mr. Gravante, if you look at the transmittal letter on the front of those two exhibits please, in the instructions there where does it say that Mr. Fahey is not to report column 6?

A It doesn't say he is not to, but it doesn't say he is to.

Q Did you hear testimony about the transmittal letters in regard to the 1968 return?

A Yes, I did, I may have to refresh my recollection on it.

Q Now then isn't the relevant portion of that 1969 letter concerning the 1968 exactly the same as the relevant portion in the earlier letters?

MR. SCACCIA: I object to that, I don't understand that at all.

Barry J. Gravante for Defendant, Cross.

THE COURT: Could I have the question?

(The Reporter read back the last question of the witness as above recorded.)

THE COURT: Sustained.

BY Mr. WELCH:

Q Mr. Gravante, if you would take a moment and read to yourself the letter dated March 28, 1969 which is part of Exhibit 25. Then take a moment and read to yourself -- well, let me first ask you, have you had an opportunity to review Mr. Fahey's individual tax returns for '68?

A I have looked it, I haven't looked at it very closely.

Q All right, if you will review that letter first, then I will ask you a question.

A O.K., I have read the letter.

Q Is there anything in that letter that tells Mr. Fahey not to report his income in 1968 from the partnership?

A No.

Q Is there anything in there that tells him to report it?

A Yes.

Q Does he report it on his individual income tax return for 1968?



Barry J. Gravante for Defendant, Cross.

A First of all let me see what the salary is, or what they characterize as salary -- yes, he clearly did.

Q So in your expert opinion, then, did he follow the accountant's advice strictly in 1968 for the 1968 return?

MR. SCACCIA: Those are the issues for this jury to determine.

THE COURT: Would you repeat the question?

BY MR. WELCH:

Q In your expert opinion as rendered as to the other letters, would you render your expert opinion as to whether or not Mr. Fahey followed the accountant's advice as to his 1968 return?

A He did not follow the advice.

Q Thank you. Now Mr. Gravante, how long have you known Tom Fahey?

A I met Mr. Fahey Monday, I am not sure of the date, this past Monday.

Q Were you retained to appear here as a witness for the defense?

A I was -- no, wait a minute I was retained to work with the defendant, and apparently to appear as a witness, yes.

Q Are you being paid?

A I certainly am.

MR. WELCH: No further questions. Thank you.

(Documents marked Defendant's Exhibits G and H for identification.)

MR. SCACCIA: May the record show I have Defendant's Exhibits G and H for identification which are the audited reports prepared and filed by Ernst & Ernst and I am given to understand by Ernst & Ernst that all of their records had been subpoenaed and are in the possession of the United States Attorney. I will hand them to the United States Attorney for verification.

THE COURT: Just make offers of what you want to do without all the speeches.

MR. SCACCIA: I offer the same in evidence if it please the Court.

MR. WELCH: If Your Honor please, may I inquire as to whether the whole document or just the pages being offered?

MR. SCACCIA: The whole document.

MR. WELCH: I might apologize. These are not in our possession. They were at one time, we had an opportunity to see them.

Your Honor please, I do object to the offer and the admission of these in evidence as incompetent.



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immaterial and irrelevant.

THE COURT: Let me see them.

(Documents handed to Court.)

THE COURT: Can you go to another subject?

These are of some length.

MR. SCACCIA: I pinpointed on the appropriate page --

THE COURT: You are offering one page? That is one thing. If you are offering the whole exhibit I have to read it, it is going to hold us up here.

MR. SCACCIA: I am content with the single page.

THE COURT: You limit your offer to the one page with the stamp on it?

MR. SCACCIA: Yes, Your Honor.

THE COURT: It seems to me you can't do it. You lay back with the whole document --

MR. SCACCIA: I am offering it for the additional instruction given for the '68 year, that is the year I objected to, and since that door has been opened by the prosecutor, I think I have a right to explain it away.

THE COURT: Is there a particular paragraph?

MR. SCACCIA: Yes, Your Honor.

THE COURT: Come up to the bench.

Barry J. Gravante for Defendant, Redirect.

(The following proceedings took place at the bench out of the hearing of the jury.)

MR. SCACCIA: Here there were no additional instructions, and then in '68 by way of comparison the accountant has a specialized instruction and direction, and it appears for the first time. This is what Mr. Boers told us.

THE COURT: Let me read it.

They are certainly relevant and material in view of the fact you have gotten into the '68 year.

MR. WELCH: It is still incompetent, it is without any foundation that Mr. Fahey received these. I will withdraw it.

THE COURT: All right, I will overrule the objection as to the paragraph that you marked there on both, and the corresponding one in this.

MR. SCACCIA: Yes.

(Documents marked H and G in evidence.)

(The following proceedings took place in the presence of the jury.)

BY MR. SCACCIA:

Q Mr. Gravante, I hand you Defendant's H and G in evidence which are the audited financial statements by Ernst & Ernst for the '67 years for Exhibit H, and Exhibit G is with respect to the 1968 year, and



Barry J. Gravante for Defendant, Redirect.

draw your attention to the paragraph marked on the face of each of those exhibits, and ask you isn't it correct that as of the 1967 year there were no special directions to Thomas Fahey or any of the partners, and that in 1968 there is a special instruction with respect to the matters of salaries?

A Yes.

Q And isn't it correct that the special instruction with respect to the salary treatment by the partners is contained in the directions for the 1968 year?

MR. WELCH: If Your Honor please, I object to this.

THE WITNESS: Yes, it is.

MR. WELCH: Characterization of these are -- as directions.

THE COURT: Sustained, they speak for themselves.

MR. SCACCIA: May it please the Court, may I read those directions to the jury?

THE COURT: Yes.

MR. SCACCIA: Reading from Exhibit D in evidence: "In accordance with the partnership agreement, the salary of one partner who also serves as administrator --" I am sorry, I am reading out of order, I want to explain to the Court apparently H is for the '67 year and G is for the '68 year if

Barry J. Gravante for Defendant, Redirect.

I said it differently I am sorry. Reading first  
from H for the '67 year: "

(Mr. Scaccia read Exhibits H and G to the  
jury.)

BY MR. SCACCIA:

Q Given that, Mr. Gravante, isn't it fair to say that  
the taxpayer and each of the partners received a  
special direction with respect to the 1968 year?

MR. WELCH: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SCACCIA:

Q Do you have an opinion as to whether Thomas Fahey  
in the preparation of his 1968 tax return had any  
instruction beyond the face of the instructions in  
B, D and C in evidence?

MR. WELCH: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SCACCIA:

Q In your opinion, Mr. Gravante, did Mr. Fahey follow  
the instructions that he received in the 1968 year  
from the accountant insofar as the partnership returns  
are concerned?

A No, he didn't.

MR. WELCH: I object to the form of that question.

THE COURT: Overruled.



Barry J. Gravante for Defendant, Redirect.

THE WITNESS: He didn't. In thinking that answer over that I gave to this gentleman, Mr. Welch, he did not follow the instructions in his '68 instruction letter. The '68 instruction letter didn't instruct him to show the \$21,000 salary.

Q And yet he did?

A And yet he did, but he seemed to be following this.

Q And you are referring to the accountant's audited statements?

A Yes.

Q And is there an indication as to when that was received?

A Well, if I am allowed -- it has to be after December 31, '68.

Q It appears on the face.

A Can I look at other than this page?

Q Yes.

A Received April 10, 1969 according to this.

Q And for the record doesn't Exhibit G in evidence contain the stamp Castle Rest Nursing Home on 116 East Castle Street, Syracuse, New York? With a phone number, received April 10, 1969?

A Yes.

MR. SCACCIA: No further questions.

MR. WELCH: I have no further questions of this

Motion for Directed Verdict of Not Guilty.

THE COURT: You are excused.

MR. SCACCIA: The defense rests.

THE COURT: All right. The jury may take a short -- well, you can take your lunch hour, and could I ask does the Government plan a rebuttal?

MR. WELCH: I was just at this point trying to make that determination. If you will indulge me for just one moment.

THE COURT: Go ahead.

MR. WELCH: No, Your Honor.

THE COURT: In that case we can take our luncheon recess and the jury return at 1:30. Don't talk about the case, don't let anybody talk about it with you.

(The jury was excused and the following proceedings took place out of the presence of the jury.)

THE COURT: All right, Mr. Scaccia.

MR. SCACCIA: If it please the Court, at this time I respectfully move for a directed verdict of not guilty. I feel on all the evidence, Your Honor, there has been no proof, certainly insufficient proof sufficient to go to the jury on the question of intent alone. There hasn't been any statements here as to admissions, no evidence as to concealment or hidden books or changed books or



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anything that would indicate the usual criteria of fraud as we know it in the usual case. More than that we have affirmative indications that there was a written, highly specific direction by the accountants here, and there has been no refutation as to the reliance on it. I simply feel in the interest of justice that the defendant ought not to be put through the ordeal of a jury wait, that it is really in the province of the Court to dismiss because of the insufficiency of the Government's entire case. I think clearly they failed to establish a prima facie case on the question of intent, without getting into the matter of anything else. I urge the Court to dismiss at this point.

THE COURT: Mr. Welch, how do you show criminal intent, assuming there was a taxable income that was not reported.

MR. WELCH: Your Honor, the first example of intent is the defendant's concealment of his income in his statements to Laura Post, the auditor, in June of 1969.

THE COURT: How do you find concealment of the income?

MR. WELCH: Mrs. Post asked Mr. Fahey if there was any other income, and Mr. Fahey said there was

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not any income.

THE COURT: If you honestly believe there was no other income, how is that concealed?

MR. WELCH: That is a question of fact for the jury.

THE COURT: That isn't enough to show. What else do you have?

MR. WELCH: In addition, Your Honor, Mr. Fahey had withheld from his salary \$1,595 which he testified to as well as being shown by the documentary evidence, withholding it was initially erroneously withheld by the partnership from Mr. Fahey's 1966 salary. Mr. Boers testified yesterday that Mr. Fahey was specifically directed to file a W-3 return claim for that refund, or at least it on his individual income tax return. Mr. Fahey testified here today that he did not file that claim for \$1595. We submit, Your Honor, he did not file that claim for \$1595 because to do so he would have to bring to the attention on that return that he had received this income in the first place which he was concealing.

THE COURT: But you have to show intent at the time, criminal intent. There is no phony books, there are no cash deals, where are the usual indicia here of income tax evasion and of criminal intent?



## Discussion.

MR. WELCH: At the time he filed that return on April 15, 1968 he did not account for the \$1595 withholding which he knew he was entitled to. He made the claim before the withholding of the FICA.

THE COURT: I am talking about the two items on the 1966 and 1967 returns, and those are the only items involved here. How do you show that he fraudulently failed to report them?

MR. WELCH: We have shown, Your Honor, through the consistency of the payments that he did report from Culotti Construction Company.

THE COURT: But he wasn't a partner in Culotti Construction Company?

MR. WELCH: But in addition we have shown the payment from Culotti Construction Company and the payments from the partnership were identical, exactly the same. We have shown that Mr. Fahey had an agreement with Walker McKinney that his salary from the partnership was going to come from Culotti or from the partnership. He wrote to Mr. McKinney asking Mr. McKinney to start paying it from the partnership because Culotti could no longer justify it to the Board of Directors. We show he knew it was income from the Culotti Construction even though it was coming from the partnership. Then he therefore would know the

## Discussion.

same figures he was receiving, \$1,666 a month, were income from the partnership also, Your Honor, that is how we showed he had knowledge it was taxable income, and that when he filed those returns --

THE COURT: Do you seriously contend here Mr. Scaccia, that there was no tax due and owing?

MR. SCACCIA: No, Your Honor, I don't mean to suggest that at all. As I see the case, given proper legal and accounting evaluation, there is no question in my mind that it was properly taxable and reportable as such. However, the taxpayer was never notified, he was under a false sense of security by Ernst & Ernst. More than that the withholding situation rather than an admission against interest I think fortified it.

THE COURT: I asked the question because I certainly think there is room for a jury to find, I think there is a jury question here on the question of intent. I am going to deny your motion to dismiss, but it seems to me as you have just said yourself, it clearly was taxable income and your client may very well have been confused. That is for a jury to find out. He may have honestly believed it was not taxable income.

If you have some requests to charge in that



## Discussion.

direction and I will be happy to consider them. Do you have on that issue of intent -- I take it that is your case?

MR. SCACCIA: Yes, that is our case.

THE COURT: It was taxable income, you don't even dispute that, but that your client was confused and didn't understand it and had no intent, that is your case, isn't it?

MR. SCACCIA: That is our case.

THE COURT: Well, we will submit it to the jury on that score, and do you have any request to charge?

MR. SCACCIA: Judge, I am sorry, in the pressure of things --

THE COURT: I would give my ordinary instructions on it.

MR. SCACCIA: Given that I am sure --

THE COURT: If you have any objection to them let me know.

MR. SCACCIA: All right, all right.

THE COURT: All right, and it would be my thinking we would have summations this afternoon.

MR. SCACCIA: I can be ready for those.

THE COURT: And I will charge the jury Monday morning at 9:30.

MR. SCACCIA: Thank you.

## Summation by Defendant.

MR. WELCH: Thank you.

(Thereupon the luncheon recess was taken.)

## AFTERNOON SESSION

(The following proceedings took place in the presence of the jury.)

THE COURT: Proceed.

MR. SCACCIA: May it please the Court, counsel, ladies and gentlemen of the jury. This is the appropriate time at the end of the trial when lawyers are permitted and are obligated indeed to not give you any evidence, and let me make it very clear to you that anything that I say to you from this point on is not evidence, as I am sure the Court will instruct you, and it is not meant to be, and let me preface to you by saying that if I in the course of my summation state anything with respect to my recollection of the evidence, anything different than yours, please of course accept yours, I don't mean to misstate or misrecollect, I will do my level best to outline the evidence exactly as it went in. If I do make a misstatement, please forgive me, that I trust is human, your recollection, the documents, the evidence and your recollection of the testimony of the witnesses is what is to be controlling.

You know I feel such a heavy burden at this time



## Summation by Defendant.

I really don't know how to start with you, because we have had a very fast trial in terms of getting things done, and obviously that is a tribute to the Federal Judiciary, the attorneys and all the officers and persons of the Court, it is part of the American way, and you know we hear an awful lot about how long it takes to get things done in the Courts, but let me tell you that this indictment was returned on November 12, 1973, that is just shy of seven months to the week from indictment to completion of trial.

Thomas Fahey, and I really don't know what the Court's practice is, and he will tell you at the appropriate time with respect to the indictment and the like, the fact of the matter is Thomas Fahey stands charged in this United States Court Room of a felony under the Federal Criminal Code, stands charged of a crime of criminal tax fraud, at other times it is called tax evasion and the like, and the Court will go into that.

The charge is not whether or not the Government is seeking to collect taxes they feel or claim is due it, this case is a criminal case, it is not a collection case, it has nothing to do with collection of the revenue as such, and I am sure the Court will give you the proper explanations of the rules of law which it

## Summation by Defendant.

is the province of the Court to do, but I want to impress upon you here and now as I talk to you how earnestly I feel and how sincerely I feel about the evidence, and because I do I may misstate it, I may misrecollect it.

In the ordinary tax fraud case, and I used to prosecute a lot of them when I was United States Attorney, the normal factor or factors that you always looked for by careful investigation were cash dealings, cash hoards, dealing with nominees, using nominees in your cash or business transactions, hidden cash, falsified books, missing records, double sets of records, and you go on, that is what we lawyers referred to as the indicia of fraud, those are the kind of things or one or the other or more that immediately are looked for to determine whether a criminal case should be made as opposed to strictly a civil case insofar as the revenue is concerned.

And I will admit to you ladies and gentlemen very frankly that when I was retained after this indictment was handed down, it was right after November 12, '73, I had to start my own investigation, and the very first thing, the very first thing that I came to as soon I learned that Ernst & Ernst was the accounting firm, a national well known and recognized



## Summation by Defendant.

accounting firm, handled all of the accounting work for the nursing home, the Castle Rest Nursing Home, and that they had handled all of the preparation of the partnership tax return, the 1965 for the nursing home, and that not only did Tom Fahey have absolutely nothing to do with the preparation, but that it was the finished product prepared by Ernst & Ernst when they submitted it to him.

I can't recall a single bit of evidence disputing that, can't recall a single bit of evidence in this case even suggesting that Thomas Fahey had even been consulted or talked to or conferred by anyone connected by Ernst & Ernst with respect to the preparation to the partnership tax return.

Now you can fairly ask, well, why should he, why should they contact him? Well, I don't think they should have, I think they would have been very remiss in thier duties had they found it necessary to do so with respect to whether it was to -- whether it was Thomas Fahey or any of the other three partners. When you ladies and gentlemen have an opportunity to go over the evidence in this case, you are going to be able to examine the documentary evidence probably for the first time during the course of this trial, and you are going to see what the case is all about. How

## Summation by Defendant.

did the case start, and insofar as the tax is concerned, Exhibit C, Defendant's Exhibit C which I quickly uncovered in the course of my investigation after I was retained, was the copy of the partnership return of income of Walker McKinney Associates for the year ended December 31, 1966, being transmitted to Mr. Thomas Fahey of Walker McKinney Associates under letter dated February 14, 1967 and signed by Allen Boers, as you heard testimony, and it is in evidence.

And when you start to look at the partnership return prepared by and submitted by Ernst & Ernst to Thomas Fahey, the taxpayer defendant here, you go through the various items as reasonable everyday people, as reasonable everyday taxpayers, and examine the complexity and the detail and the technical terms contained in that return, with figures all over the last page, half the -- half over the next to last page, special insert that the accounting firm felt necessary to add to the return as a schedule, not to mention on-- not to mention all of the lines and characterizations in columns you see throughout the return.

What I am saying to you ladies and gentlemen is if Ernst & Ernst had simply given Thomas Fahey the partnership return in its executed, or pardon me, its completed form for his execution, that means his



## Summation by Defendant.

signature, remember they countersigned it, the taxpayer's copy, and that is exactly what he gets, I ask each and every one of you how could you possibly know what to do with it standing alone on its face.

You examine, you read it, you go through it, you study it and see what you as reasonable everyday, ordinary American taxpayers could make out of it.

What I am saying is very simple -- in simple terms what I am saying is that the case just cries for advice and instructions, not only this case, but any case of a partnership return under a very complicated Federal tax law, and in my humble opinion as a lawyer, the partnership tax laws are the most complicated of all the internal revenue laws.

I would have been in a position, having had some experience in that field, of being required to get some advice or instructions from a man competent, preferably a Certified Public Accountant would have been my bet, and that was built right in. Ernst & Ernst are Certified Public Accountants, and they recognize this, and any decent accountant recognizes this fact, and certainly Public Accountants, Certified Public Accountants know it better than anybody else, and Ernst & Ernst know it.

They proceeded to draft a letter addressed to

## Summation by Defendant.

Thomas Fahey specifically, the defendant in this criminal tax trial, and this is what they said to him, and I am reading from Exhibit C, February 14, 1967: "Mr. Thomas Fahey, Walker McKinney Associates, 205 Midtown Plaza, Syracuse, New York." Incidentally, bear in mind that the nursing home was under construction and under renovation, I think that is what explains the difference in address, they obviously couldn't have their offices right in the nursing home that is being remodeled. "Dear Mr. Fahey, we enclose in duplicate U.S. Partnership Return of Income of Walker McKinney Associates for the ended December 31, 1966." Now let's look at the very document they enclose. They said in duplicate and here it is, Government Exhibit 5 in evidence, 1966, there is the original of the two where they referred to duplicate, this is the second copy, the original, and you know when you look at the evidence that this is the ribbon copy. When I say "this" I am referring to Exhibit 5 is the ribbon copy, and Defendant's Exhibit C is the carbon copy.

"We enclose in duplicate U.S. Partnership return of income of Walker McKinney Associates for the year ended December 31, 1966. The original should be signed --" referring to Government Exhibit 5 --



## Summation by Defendant.

should be signed and dated by a partner." Look at the bottom of Government Exhibit 5 and you will see where it says "sign here, Thomas M. Fahey, Partner" and off to the right 3/27/67, which I assume is the date he signed. Underneath that "Allen E. Boers, Ernst & Ernst, Syracuse, New York, and dated February 14, 1967, corresponding with the letter of transmittal. It doesn't say -- let me go on with what it does say. "The original should be signed and dated," and that was done by a partner and forwarded to Internal Revenue Service, Buffalo, New York. And the fact Government Exhibit 5 is here in this Court room shows that it had been signed and dated by the partner and filed with the Internal Revenue Service in Buffalo, New York and it carries out the instructions to the letter. It goes on -- excuse me, I forgot the 14202 -- in sufficient time to reach that office on or before April 15, 1967. Exhibit 5 shows the date 3/27/67, and I assume and I have heard the dispute, I don't have to assume, the letter of transmittal, and I didn't know this until this minute, from the Castle Nurse -- Castle Rest Nursing Home, is right inside the return with a postmark date, and of course it is part of the evidence, you can look at it, showing Syracuse, New York, as best I can read it, 27 March 1967, addressed

## Summation by Defendant.

to Internal Revenue Service, Buffalo, New York 14202.

There is the envelope cancelled, and right in the Government's own exhibit.

Thomas Fahey complied to the letter with those instructions, he did exactly what he was told to do.

The next sentence says "The form marked 'taxpayer's copy' is for your files," and Government Exhibit C has a stamp, a rubber stamp "Taxpayer's copy," and that is the copy that is attached to the letter of transmittal and comprising Exhibit C, the Defendant's Exhibit C.

Now let's go to the next paragraph, it is a short letter: "There is no tax due with this return. Each partner should include in his 1966 U.S. Individual Income Tax Return the amount shown opposite his name in Schedule K, column 4." Let's look at it, here is the original Government Exhibit 5, we turn to Schedule K and we find on the next to last page Schedule K, "Partner's share of income, credits and deductions," and then you can read it for yourself when you go to the jury room, a column number one, "State the name and address of each partner, designate on residents" and so forth. Then they have A, B, C, D, E and under "A" they have Walker McKinney, 47 E. 87th Street, New York 10028, Social Security 382026,



## Summation by Defendant.

percentage of time devoted to business and so forth, and then you have column 4, that is the column specifically indicated in the return instructions by the Certified Public Accountant, column 4, Walker McKinney, in parenthesis -- if I may take the liberty, if it is in parenthesis it means a loss, \$12,875.50. Then another column 5 and then other columns continuing and nothing for Walker McKinney beyond that. The next entry is for B, Theodore Metzger, 206 Fellows Avenue, Syracuse, New York, Social Security Number 096148047, percentage time devoted to business again the word "part" and then blanks for column 4 and thereafter for Theodore Metzger. Then we get to "C", I assume the Government made the red marking here, it may have been Thomas Fahey, in any event it is here, "C" Thomas Fahey, 415 Stratford Street, Syracuse, New York, Social Security Number 097226546, percentage of time devoted to business the word "all." Column 4 is absolutely blank, look at it, absolutely blank for time for Thomas Fahey. Then column 5 is absolutely blank, so it isn't a question of somebody making a mistake as to columns, then they jump down with a cross line, I don't mean a cross line but a heavy bar type line separating the portions I have just read to you, and they come down and they have new columns and they

## Summation by Defendant.

have column 6 with the letters, and then just "C", the letter "C" which means Thomas Fahey, \$14,994, right there in the partnership return, and then off to the right, column 12 an expense item \$508.31 opposite Thomas Fahey. And then finally the fourth part, George Simpson "D" 592 Park Avenue, East Orange, New Jersey, 007017, Social Security Number 001127129, percentage of time devoted to business "Part," column 4 for Dr. Simpson, "Ordinary Income or loss (\$2,275.15" which again I interpret to mean loss. Then to the right -- nothing for the balance of that for Dr. Simpson, and then there is a total under the ordinary income of column 4 up to the heavy line, the amount \$15,147.65, clear, detailed, specific, allegations are made by the Accountant in every inch of the way. Given all of that and more than that you come right back to page one, Thomas Fahey, Thomas Fahey signed the return and the return is filed, and all of that information together with everything else in there is filed on time with the Government, with the Social Security Number, his name, his address, the part he plays in the partnership, either part time or all, in this case he marked "all," he was the only partner who marked "all", I assume that means all of his time is devoted to the business, and it is filed, the



## Summation by Defendant.

original is filed with the Government, with the Internal Revenue Service in Buffalo, New York and what happens with respect to Thomas Fahey's personal income tax return? You heard his testimony as to how he prepared his income tax return, much the same as I suppose most of you and as I do, comes income tax figuring time you get all the relevant papers and documents and W-2's and whatever we have, our expenses or doctor bills, whatever we have, and we spread them out in front of us, and Thomas Fahey had his in front of him together with the rest of his data, and I think his wife's data, I think he testified, the Ernst & Ernst documents. He got it, or shortly after February 14, 1967, a very clear specific direction instructing him as to which amount shown opposite his name should be included in his 1966 U.S. Individual Income Tax Return. He goes to that very specific amount, very specific column, very specific section, Schedule K, and I find nothing in that block for him, not only not for him but not for Theodore Metzger. All the allocations are made by the accountant. If ever I heard of a case that cries that a not guilty verdict, it is this one.

On the strength of that kind of highly specific written detailed instruction, and it wasn't an

## Summation by Defendant.

accidental instruction, when I say "they," I am talking Ernst & Ernst, they may have been careless, I think one of them said it was an oversight, but my word for it is it isn't the only time it happened, March 17, 1966, no, referring to the 1965 transmittal, precisely the same type of instruction, the indictment years are '66 and '67. In 1965 with respect to the 1965 tax year, and of course it is not until March in this case of 1966, Exhibit B in evidence, precisely the same type of instruction. Oversight?

Exhibit C, dated February 14, 1967 transmitting to the taxpayer the 1966 tax return, precisely the same instruction. Oversight? April 2, 1968, beyond the indictment years, yes, April 2, 1968 as evidenced by defendant's Exhibit D in evidence, precisely the same type of instruction, and I think it had additional information, additional instructions with respect to investments credit which I suppose is something that came up about that time. Oversight?

I say to you that Thomas Fahey had an absolutely perfect right, more than that, he had a perfect duty as I stand here to follow the instructions in those letters to the letter, and those are the two years, 1966 and 1967 that he is charged with criminal tax evasion.



## Summation by Defendant.

Think about 1966. In 1966 as I recall the testimony Sheldon Kall a prior accountant prior to the retention of the Ernst & Ernst firm had recommended or advised that withholding be taken from Thomas Fahey's payments received from the nursing home, and you heard it from Mr. Boers that when Ernst & Ernst were retained, they advised that it was improper to withhold on Thomas Fahey because he was a partner. More than that he was entitled to a refund for the amounts that were withheld, and apparently there is some complicated FICA as well as other facets connected with the return or the refund, and I don't understand it all -- at all, except that it appears from what I have heard from the experts that in a partnership situation there is different treatment with respect to Social Security and withholding as against -- social security as withholding, but in any case Ernst & Ernst said to stop the withholding, they didn't say it to Fahey, they tell their client Castle Rest Nursing Home you are to withhold on Thomas Fahey because he is a partner.

So you tell me whether or not an average, reasonable everyday taxpayer isn't lulled into a false sense of security given an attempt to withhold and your accountant tells you it is wrong, you are not supposed

## Summation by Defendant.

to withhold, and then when it comes to income tax filing time receiving the letter of specific instructions that are here in evidence in this court room. I say that Thomas Fahey was obligated to follow instructions in those years without question, and if he had any question would have had to go to another accountant, and how many of us would call another accountant to check on Ernst & Ernst? I wouldn't and I don't think anybody else would reasonably expect Thomas Fahey should have. There was nothing that would alert him to the need or necessity for doing so.

More than that Mr. Boers and Mr. Foody and Thomas Fahey have all testified, the undisputed testimony here is that nobody ever directly or indirectly, expressly or impliedly, orally or in writing altered the instructions contained in these letters.

And you know we heard on that point, we heard about Michael Wilton the Special Agent of the Intelligence Division who sits right behind me who was investigating that case, we heard that he had investigating that case, but we didn't hear Michael Wilton testify in this case. Isn't it terribly important that United States Government, having a Special Agent investigate a case which would wind up



## Summation by Defendant.

here in the United States Court room that if they could have had the slightest basis for contradicting anything that Thomas Fahey has testified to or any of the other witnesses for that matter, they would have rolled out a red carpet ~~th~~ough this court room and they would have ushered him in and they would have had him take the stand and testify and tell you ladies and gentlemen of the jury and this court = "hey, we caught Thomas Fahey in a lie, and this is what he lied about," or "we caught Thomas Fahey falsifying books" or "we caught Thomas Fahey with a double set of books" or anyone of those other what I called indicia of fraud, not one of them present in this case, not one of them is present in this case, and for my part I can't understand how it reached this point, except that during the course of my investigation I had to turn all of this defense evidence, the file copies with Boers, the original of the partnership returns filed with the Government, all sorts of checks and cross checks and social security numbers, that is how they locate documents and tie them in, that is why the Internal Revenue Service wants and has a proper right to request and demand that they be furnished the social security numbers, because that is their way of identifying each of us taxpayers and all of our records,

## Summation by Defendant.

especially these days of computerization, it is a perfectly good sensible very efficient system. So you tell me why with Ernst & Ernst, why were they so easily and readily available to them, and particularly to the United States Government, upon first inquiry, just as I did during the course of investigation, determined what did they have in their documents, what did they have in their files on this taxpayer, and they would have turned up the file copies of the Government's Exhibit B, C and D.

It is shameful that an American citizen has to be subjected to trial and ordeal of a criminal tax fraud trial. It is a very, very anguishing matter for any of us to have to go through, and you know I could go on and on but I am not going to bore you with recollection of the evidence. As I see this case there was nothing but confusion from the start. You heard that there are three partnership agreements, at least writings, trying to reconstruct these defendant's exhibits memos of understanding and writing. The Government thought that there was only one written agreement ever in existence in this case. They thought that because that is all they produced was Government Exhibit 19, I think was the number, yes, Government Exhibit 19, this is the only exhibit, the November 16,



## Summation by Defendant.

1965 exhibit, Government 19, that is the only one they produced. And what does it mean? It means that is the only one they uncovered during their investigation, signed by all the partners. All they had to do was to the Castle Rest, and I am sure they did, but they didn't do a thorough complete investigation, because if they had done so they would have learned as to the existence of Exhibit E, the memorandum of understanding dated November 23, 1964 signed by all of the parties, they would have learned as to the existence of defendant's exhibit F in evidence dated January 4, 1965, so there were three written agreements treating with this partnership, and you have heard the evidence of that, but that isn't all.

McKinney, the Government's own witness, Walker McKinney testified in this Court room that beyond the written agreements they were constantly making changes orally and sometimes with a letter between the partners, and one of those changes took place in September of 1967 September 6 and September 7, 1967 when in addition to Thomas Fahey receiving payments from the partnership Walker McKinney was going to receive payments I think at the rate of \$12,000 a year, and I think Dr. Simpson was going to receive payments I think at \$2400 a year, and Walker McKinney testified, and it

## Summation by Defendant.

has never been disputed by the Government, their own witness, that all of the partners agreed that all the payments received by the partners were to be treated as draws and advances.

What I am saying to you people is that nobody, even the very man who went into litigation, the Government's own witness, Walker McKinney never contended that anybody has ever told Thomas Fahey that the money he was receiving strictly from the nursing home was taxable income, beginning with the accountant and ending with their enemy that he went through litigation with, Walker McKinney.

Walker McKinney testified in no uncertain terms that all of the partners agreed on September 1967 that all of the payments for all the partners were to be treated as draws or advances. Now how the accountant handled it I don't know. The accountants weren't picked by Thomas Fahey, the accountants were picked by Walker McKinney and his lawyer Mr. Murray. It wasn't Thomas Fahey's job to pick the accountants who would handle these affairs, it turned out to be the accountant for the other side once they got into litigation, and nobody ever testified in the slightest or has even suggested that Thomas Fahey was ever told that the payments he was receiving from the partnership



## Summation by Defendant.

to himself as a partner were taxable income.

Given all of that, with all of that construction, the partners making deals and changing them, sometimes the salaries went up and down, as I recall Walker McKinney's testimony and Thomas Fahey testifying that January '68 the proposal to be 80-20, split right down the line, all sorts of changes and fluctuations, I don't know how any reasonable taxpayer in Thomas Fahey's position, trying to establish himself in his chosen position, his life's work, trying to make go a really fine community service idea, convert a hospital that had been abandoned into a nursing home, how anybody should be alerted in the slightest to have to go to any expert beyond the experts they had.

I know what the Government is going to say, the Government is going to say "oh, Thomas Fahey never told anybody about that, never told anybody about that." We haven't heard from Mr. Wilton, the Government's investigator, and you never will because they chose not to call him.

I say to you that that is proof positive that he was in no position to dispute any of the testimony that you people heard in this United States Court room.

So why does Thomas Fahey have to go through the

## Summation by Defendant.

ordeal of a Federal felony trial? If there is any tax due and owing, if the Government claims there is any tax due and owing, and they haven't yet, my word, there are all sorts of investigations available to them, the civil side of the case is certainly open, that means the collection, they have all the facilities of audit and collection and tax courts and all the rest of the things available to them --

MR. WELCH: If Your Honor please, I believe that Mr. Scaccia is misstating the law to the jury.

THE COURT: Please, Mr. Scaccia, please leave the law to the Court.

MR. SCACCIA: I am sorry, Your Honor, I am sorry.

I can tell you that I haven't heard a single word about intent, there has been a complete lack of evidence as to any affirmative evidence of intent here. What is criminal? Where is the intent? Thomas Fahey was put to the position where he had to prove his innocence, not that that is what the law requires, but that is what you have to do in a case like this.

I submit to you ladies and gentlemen that they have clearly not only created a reasonable doubt as to criminal intent here, we have established its



## Summation by Government.

absence beyond a reasonable doubt, and I am going to close by simply stating to you that if anywhere anybody can get justice it is in a United States Court room and we can certainly live with a determination at your hands, and we ask, based upon the evidence and the law the Court will give you at a later time, applying the law to the facts, that you swiftly, promptly give a verdict of not guilty on all counts.

Thank you.

THE COURT: Alright, Mr. Welch.

MR. WELCH: Thank you, Your Honor. If it please the Court, Mr. Scaccia, ladies and gentlemen. It has been a very short trial, went very quickly, so there are some documents that you might not totally understand which you can take into the jury room and examine, but the real core issue here, as Mr. Scaccia says, did Thomas Fahey know this was reportable income?

Thomas Fahey is a highly educated man, he is in business, a man who took the job as administrator of the nursing home to get the financing for this nursing home. Did this highly educated man, in spite of his protestations he didn't know, did he know this was taxable income? That is your question first. And I would like you to decide that question, I think it is an important thing for you to do, it is an important

## Summation by Government.

function that every citizen should serve, when the evidence looks like a person committed a crime, you weight it and you decide it.

There is a second question, if this man, this highly educated man here, business wise man, if he knew that this was reportable, taxable income and still did not report it, did he do so with intent to defeat the tax, to evade or defeat the tax, that is the second thing for you to decide.

There are more real issues in this trial, the defense has just about conceded that. The important thing is did Mr. Fahey willfully fail to report what he knew he should have reported in order to beat that tax, that is what I am asking you to decide from the basis of that evidence and the testimony you heard on the stand.

Now the figures that Mr. Cullem testified to about the taxes, the figures in the indictment about the reported tax due and owing, about the true tax due and owing, really hinge, as you can see from the questions on cross examination, really hinge on that one item that is used as a starting point. Mr. Cullem's figures, you recall each of you got a copy of Exhibit 24, I believe, and you recall that at one point when I asked Mr. Cullem to go through this material and he



## Summation by Government.

got to the point where it says "unreported gross salary 1966 \$14,944," and on the 1967 schedule there was also an unreported gross salary in this instance for 1967 \$11,666.22, Mr. Scaccia jumped up and properly so, because he felt that was something you should decide whether or not that is reported or unreported income. That is something for you to decide. But when you decide that, then the figures will fall in line.

So that I am telling you all this so when you retire to that jury room, I am not asking you sit down and go through all these long involved documents to see whether or not every dollar and cent was properly accounted for in the evidence, Mr. Scaccia wasn't asking for that, get to the bigger issues. What did this man know and what he do when he filed these returns? Those are the issues.

I can't impress enough on you the fact that Mr. Scaccia comes here, stands at the bar and asks you to look at the evidence, the transmittal letters from the Accountant, as any reasonable taxpayer would. But Thomas Fahey is not any reasonable taxpayer. There is a man who has a lot more expertise in business matters than any one of us would have --

MR. SCACCIA: I object to that as an improper

## Summation by Government.

characterization not founded in the evidence.

THE COURT: I think it is within the realm of argument, it is for the jury to say.

MR. WELCH: Did you hear Mr. Fahey spend a large part of the afternoon telling you about his educational background, about what he was doing for the nursing home, doing the financing arrangements, that is what I was referring to in the evidence. That is in the evidence, Mr. Scaccia elicited that testimony. Now when you think about that, think about a man with that background looking at those transmittal letters.

Mr. Scaccia asks or told you this was a case that cries out for some advice, expert advice. Mr. Fahey told you that he filed his 1966 return a year late, in April of 1968, because there was confusion in his mind about what sums were to be treat and what- to be treated and what way. Why doesn't this man go to an accountant and ask him for advice? He never did.

I submit you can judge from that yourself that this man knew this was taxable income.

Now these other agreements the defendant entered into evidence, you heard the testimony of Mr. McKinney and you heard the testimony from Mr. Fahey, the Government's Exhibits, the Articles of Partnership governing the agreements, that was the only one that



## Summation by Government.

covered what it was Mr. Fahey was to be paid, that salary, and that salary is all we are asking you to consider.

The case, although it went in quickly, it is a simple case, and there are sometimes a lot of things that advocate think we should call to each other's attention, and that is why I have the notes, please don't be intimidated by the number of them, it won't take that long.

When you retire to the jury room it is going to be important for you to look at some of these documents. For example, if you will take a look at the Articles of the Partnership, Article 7, Mr. Fahey is to receive \$20,000 a year. Then think about the testimony which showed you in fact when we did the addition right on the witness stand at one point, that combined from the Culotti Construction Company and from the partnership Mr. Fahey got \$19,999 or some odd dollars, close to \$20,000. Then take a look at the financial statements that Mr. Fahey submitted to the Marine Midland Bank. Take a look at the bottom line, the words "annual income," you are going to find that Mr. Fahey claimed \$20,000. This is his financial condition as of January 1, 1968. In January Mr. Fahey is claiming he has an annual income of \$20,000, be it

## Summation by Government.

from Culotti Construction or from Walker McKinney Associates, the nursing home, but he says to the Marine Midland Bank "I am getting \$20,000 income." Part of that \$20,000 income is made up from Culotti Construction Company, no question in his mind as to that, he reports that on his income tax return, that is taxable income and that is reportable.

You heard Mr. McKinney, you heard Mr. Fahey establish that in fact what he was getting from Culotti Construction Company was nothing more than part of the \$20,000 he was guaranteed under the partnership --

MR. SCACCIA: I object to that, Your Honor, I have no such recollection that Mr. Fahey so testified.

THE COURT: Please don't interrupt. The juror's memory of the evidence will control.

MR. WELCH: Please, ladies and gentlemen, if I do misstate something, I do not do so deliberately, your recollection does control, and when you get back into the jury room if you recall something differently call it your fellow jurors attention, because it might become significant to you. No question that Mr. McKinney testified that the \$20,000 in the Articles of Partnership was going to come from Culotti Construction and from the partnership, but really that



## Summation by Government.

really made up, the \$20,000 from the partnership, yet for some unexplained reason Mr. Fahey reports only the Culotti Construction Company -- I shouldn't say unexplained, he explains it, he says he had a transmittal letter which mislead him.

I think there is another point I would like to make with you ladies and gentlemen, and that is when you listen to the Judge's instructions keep in mind that the Government does not have to prove beyond all doubt Mr. Fahey's guilt, nobody can prove anything beyond a certainty or up to a certainty, just beyond a reasonable doubt, and that is something to think about, a reasonable doubt.

There is another picture which you ought to get. Mr. Fahey, or Mr. Scaccia, the defense has not denied that the money came -- they were happy to stipulate Mr. Fahey did receive the money. Now when you get \$14,000 or \$11,000, don't you consider that income? Can you ignore \$14,000 or \$11,000 when you file your income tax returns? Would you ignore it on the basis of some letter that at best is misleading?

There is another factor to consider about that money coming from Culotti Construction Company and that money coming from the Walker McKinney Associates Nursing Home, can it be a coincidence that the sum

## Summation by Government.

was the same in '67, same \$1,666 from Culotti and then he gets \$1,666 from the nursing home when he is off the Culotti payroll, and yet he chose to treat them differently. How then, if things are as Mr. Fahey has asked you to believe they are, that he didn't know when he filed returns for '66 and '67 that this income from the partnership was in fact salary or was income that has to be on the income tax return? But then he tells you when he files that return he was operating under some new instructions that he got in this report by the accountant which was the folded over document the defense put into evidence. Why is it when I asked Mr. Fahey "Did you ever file amended returns concerning '66 and '67" he is now told the partnership income is income and has to be reported, why is it he never filed amended returns? He might have been confused during those days, if you want to believe that, but at one point or the other it did become clarified, because in 1968 he did in fact report that income in spite of the fact of the letter from the accountant that read exactly the same, they same it was clarified now because he had this report from Ernst & Ernst the accountant which talked about salary, and that is why he reported it, he still never made those amended returns.



## Summation by Government.

If you think it is important in your decision when you go into the jury room, when you look at the 1968 transmittal letter which is identical in the relevant paragraphs to the letters concerning '66 and '67, then Exhibit 25, a carbon copy of the '68 partnership return of income and just the same as the other letters, it says there is no tax due with this return, each partner should include in the individual tax return the amounts shown opposite his name in Schedule K column 4, that is what it says, and you will look in Schedule K column 4 and see there is no figure next to Mr. Fahey's name.

Mr. Scaccia has asked you to conclude this mislead Mr. Fahey, and that is why he filed as he did.

The letter is silent about column 6 in which the salary income of Mr. Fahey is listed. Is it credible that Mr. Fahey then chooses to file this and completely ignore the large sum in column 6 on these returns?

These transmittal letters of the accountant, before you decide that maybe Mr. Fahey followed the advice of an accountant or his accountant, remember what Mr. Boers said, he said it is not his understanding of their responsibility, this is my recollection, it is not his understanding of their responsibility in Ernst & Ernst to advise the individual partners of

## Summation by Government.

what they should do with the amounts in the partnership return on their own individual return, that wasn't their job. Mr. Boers in Ernst & Ernst were the accountants for Castle Rest Nursing Home, not for Mr. Fahey, it wasn't their job to tell Mr. Fahey about the individual returns, and they didn't and he didn't ask them.

This newly hired accountant that came into court today, what he -- what did he say? He took the witness stand and assumed that what Thomas Fahey said on the stand was true and assumed what it was that was brought out from Mr. McKinney on cross examination by the defense as true and accurate and said "Good, this is so, then Mr. Fahey was following instructions, was doing the proper thing by not reporting this taxable income." But you first you have to believe Mr. Fahey's self-serving statement about that before you get into the accountant that was on the witness stand today.

Look at the facts that are in evidence, the hard facts. Mr. Fahey wants you to believe that there is something else, something outside the scope of these agreements, yet Mr. Fahey has signed this agreement which talks about his \$20,000 a year salary. Mr. Fahey told you it was his understanding that he



## Summation by Government.

would be entitled to depreciation. Well show it to us in the Articles of Partnership. Well, it is silent on that issue. It is a tough question, you have to judge for yourself.

And ultimately Mr. Fahey told you on the witness stand that he got \$175,000 award for those years. Now if that is so that is going to increase his income for those years if he does it by law --

MR. SCACCIA: Your Honor, I have got to object to that.

THE COURT: Yes, I don't recall any such evidence as that at all. Please, Mr. Welch, why don't you talk about arguments in the case?

MR. WELCH: Now, ladies and gentlemen, Mr. Scaccia mentioned to you that Mr. Fahey did -- well, I will move on, you did hear me ask Mr. Fahey some questions about the FICA or the Social Security withheld from his salary during the initial part of 1966, and it was improper, and why was it improper? Well, as Mr. Fahey himself said on the form, on the 843 form that he submitted to the Government on behalf of the partnership, that he was administering, he said it was improper because the partner or employee, Mr. Fahey, is required to and will pay self-employment tax, that is what he said, but he did claim and did back -- get

## Summation by Government.

back approximately \$540 all together, half of which was the partnership's and half of which was his. But I asked him about the Federal withholding that was withheld from his salary that year, Federal Income Tax which the accountant told him was erroneously withheld. First I asked Mr. Boers, he said if he had prepared it for Mr. Fahey, the forms to get the return of that money, think of what Mr. Boers said, that he had prepared a W-3, he specifically said, and there was some discussion about Mr. Fahey should then attach that to his individual return, but then I asked Mr. Fahey did he take credit for that money that he paid that was withheld from salary in '66, did he take credit for that on his individual return or file a form for the return of that money, he said no, he said no because there was no way he could do it. Mr. Boers said he should do it on his individual tax return. Now think about those two facts for a minute. Why is it that he did in fact get back the FICA that was improperly withheld, not a question of whether any money should be taken from his salary, it is a question of whether or not it should have been withheld or he should pay it he -- he should pay it himself. At any rate, why is it he got the \$500 back and not the Federal withholding tax?



## Summation by Government.

I submit that you can conclude the reason he did that because half of that FICA was the partners money and the accountants were looking over his shoulder telling him to get it back, they weren't Mr. Fahey's accountants, they couldn't care less if he got his withholding back or put it on his return, so Mr. Fahey has \$1500 in the Federal Treasury withheld from his partnership salary, why don't report it on his 1966 individual tax return and get it back?

Take a look at that return, he did get a refund on that return. I am going to ask you to look at that fact and conclude the reason he didn't do that in order to justify that money and get it back, he would also have had to report the income from which it was withheld, it is the partnership salary, and I am going to ask you to think about that in terms of concealment, think about that in terms of intent to defraud the Government out of the tax due and owing them. He didn't want to get into withholding with the Government because he would get into the whole business of the partnership income.

Now in 1969 he was audited by Mrs. Laura Post. Mrs. Post came here and testified to you. She told you that she asked him if on this 1967 return he reported all income, and she said he response -- his

## Summation by Government.

response was yes he had. Well, he had not reported the partnership salary, so was he concealing from Mrs. Post some of that income? Well, you conclude he was not concealing it if you thought he didn't consider it as income, yet everything else indicates that he would have considered it as income.

Let's take a look at that letter he wrote to Mr. McKinney, April 6, 1966. Take a look at Government's Exhibit 28, you can read the whole exhibit, just for sake of expediency I will read the relevant part I am arguing to you about.

This is addressed to Walker from Tom, April 6, '66: "Moreover in view of the strong possibility that construction may not commence until June, Reno Culotti, Culotti Construction Company, can no longer justify my salary to his directors. I think this is understandable considering the fact that he budgeted a maximum of one year of set expense and has already well exceeded this. We discussed this briefly on our second last visit to Syracuse and I think you can understand his position -- I must now ask the partnership to assume the expense of my salary and -- until such time as the operating reserve is deposited with Marine Midland. I wish this were not the case, but given my heavy personal responsibilities, a regular



## Summation by Government.

salary is essential for subsistence to keep my mind free to tackle the large amount of work ahead of us."

This is income to this man just as your salary is income, and he knows it.

Laura Post asked if he has reported all of his income in '67, she asked that question June 6. He said yes when in fact he hasn't reported that salary from the partnership. Was he concealing something from Laura Post? And if he was concealing something from Laura Post why was he doing so. There would be additional tax on that partnership salary.

Now what else is there in the record to establish this intent to defraud? Well, there is concealment from Laura Post. Then there is this additional concealment by not even attempting to get back his money, his Federal Income Tax that was withheld in '66 when he in fact filed his '66 return.

Here is a letter talking about a man who has some extra responsibility, he is asking for money for the partnership to start paying in 1966. Take a look at that return filed a year late. On that return filed a year late he claims a refund, a man in dire straits for money, first a return claiming a refund, he files it a year late.

MR. SCACCIA: Your Honor, I want to object, no

## Summation by Government.

evidence at all about being in dire straights anywhere in the record.

THE COURT: I instruct you not to interrupt again. He did make a claim for refund, it is legitimate, if somebody waits a whole year to file a claim for refund he is not in dire straights for money. Proceed.

MR. WELCH: Thank you, Your Honor. What I was about to say, the reason you can find he waited that whole year to file that return is not because there was confusion in the partnership, but so Tom Fahey could get away with not paying the tax on his partnership return. If he had reported the partnership income, I am sure he could have taken credit for what was withheld, but it also would have increased his income. In 1966 that figure is \$14,000, that would have been a substantial increase, and there definitely is more tax due and owing. Take a look at the figures on the computations, that is why he didn't file it on time, because he knew if he filed it on time and was truthful he would have to pay a tax.

Intent to defraud, there is intent to defraud. Now if there is some confusion in your mind about depreciation or something of that nature and what Mr. Fahey understood, take a look at those documents



## Summation by Government.

and see what it says, they are silent. Once you have done that you can disregard that unless you believe what Mr. Fahey tells you on the witness stand that was in his mind. Mr. Fahey is on trial here, that is a self-serving statement. It really is a simple matter, a simple issue for you to decide. Here is a man who receives \$14,000, that is a round figure, 1966, and \$11,000 in 1967. You figure what large percentage of his total income that really is, and he leaves that off the return, and find he knew it was supposed to be put on instead of leaving it off, it certainly demonstrates this man willfully and intentionally intended to defeat that tax, it is a lot of money.

I thank you for putting up with the slowness with which I handled these documents. I do attempt to be careful and not to mislead you. I am just going to ask you one final thing, and it is important to every one here, just consider this evidence, consider it carefully, consider it in the light of the background of this man who is involved in this thing, and listen to His Honor's instructions. If you consider that evidence in that light, weighing Mr. Fahey's testimony, keeping in mind that he is on trial and he might very well want to say things that are very

## Summation by Government.

self-serving, even if he lies, consider that evidence and consider the Judge's instructions and then there is only one verdict you can come back with and that is that Thomas Fahey knew he had report -- had to report that income, willfully and deliberately did not report that income and for the purpose of defeating that tax.

Thank you.

THE COURT: We will recess now, adjourn now until Monday morning at 9:30 at which time the Court will instruct you on the law that applies to this case.

Don't talk about the case with anybody, not even among yourselves.

Have a nice weekend, don't talk about it or let anybody talk with you about it. Wait until you have heard the court's instructions Monday morning then you will have all the opportunity you want to discuss it with each other in the jury room.

(Thereupon a recess was taken to June 10, 1974 at 9:30 a.m.



Proceedings, dated June 10, 1974.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

----- -X  
:  
UNITED STATES OF AMERICA,  
:  
- against -  
:  
THOMAS E. FAHEY,  
:  
Defendant.  
:  
----- -X

73-Cr-181

The above-entitled action was continued pursuant to adjournment at the United States District Court in and for the Northern District of New York, at Auburn, New York, on Monday, June 10, 1974, at 9.45 a.m. o'clock, before HON. LLOYD F. MACMAHON, United States District Judge sitting by designation, and a Jury.

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Judge's Charge to the Jury.

A P P E A R A N C E S:

HON. JAMES M. SULLIVAN, Jr., United States Attorney for the Northern District of New York, Federal Building, Syracuse, New York, By: EUGENE WELCH, ESQ., Assistant U. S. Attorney, Of Counsel, appearing in behalf of the United States.

-and-

DANTE M. SCACCIA, ESQ., Attorney and Counsellor at Law, Wilson Building, Syracuse, New York, appearing in behalf of the Defendant.

Defendant in person.

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(At 9.45 a.m. the jury entered the court-room and was seated in the jury box.)

THE COURT: Good morning.

THE JURORS: Good morning.

J U D G E ' S     C H A R G E

MacMAHON: J.

The Court and the jury have different functions. It is my functioning duty to instruct you on the law that applies to this case and it is your duty to accept the law as I give it to you



## Judge's Charge to the Jury.

whether or not you agree with it, and it is your duty to apply the law as I give it to you to the facts as you found them.

In short, I am the exclusive judge of the law. You, the jury, are the exclusive judge of the facts. You and you alone decide what weight, what effect and what value you will give to the evidence. You decide whether or not you believe the witnesses and of course ultimately you decide the guilt or innocence of this defendant on trial.

You are not to conclude from any rulings that I have made throughout this trial or any questions that I may have asked, that I have any opinion one way or the other as to the guilt or innocence of the defendant. That decision is exclusively up to you.

Now finding the facts is merely the process by which you, the jury, consider the exhibits and the testimony of all of the witnesses, sift out what you believe, weigh it in the scale of your reasoning powers, draw such conclusions as your experience and your common sense tell you the evidence supports and decide just where the truth lies in this case.

## Judge's Charge to the Jury.

Now in this connection it is your memory of the evidence that controls. It is not the way I remember; it is not the way counsel remembers. If your memory squares with what either of the lawyers said in their closing arguments you may accept their version. But to the extent that you have a different recollection of the evidence you are bound by your oath to rely on your memory.

Now one of your most important functions is determining which witnesses you will believe. And this is so as to every witness, whether the witness was called by the government or the defense. You are not to be influenced by the number of witnesses called by either side or even by the number of documents received in evidence. We are concerned not with the quantity but with the quality of the evidence.

The first test which you should apply in determining the trustworthiness of the witness is to measure what he says against your plain every day common sense. You are not bound to believe unreasonable statements or to accept testimony that defies your common sense or insults your intelligence just because the statements



## Judge's Charge to the Jury.

are made under oath in the witness stand in a public courtroom. You saw the witnesses in this case. In deciding whether to believe a witness you should consider his conduct and his manner on the stand. I saw you observing every witness with particular care as they were testifying. How did he strike you? How did he impress you? Was the witness being frank with you or was he being evasive? Did his version of the facts as he testified appear to be straightforward? Was he trying to conceal some of the facts? Was he just parroting answers? Does he have any motive to testify falsely? Is he interested in the outcome of this case? How strong or weak was knowledge of important evidence? In short, can you rely on him. Can you trust him? Did he show any bias or prejudice or was he hostile or friendly to either side? You ought to consider also his opportunity to know the facts about which he testified, and the probability or improbability of what he said? How does his testimony add up when you consider it along with the other testimony and particularly with the immutable documentary evidence which of course cannot change their story? Are there

## Judge's Charge to the Jury.

any inconsistencies in the witness' testimony and if so how important are they? Has the witness made any inconsistent statement on an earlier occasion and if so how important is that?

Now the defendant Mr. Fahey took the stand here and testified as a witness in his own behalf. He was not required to. His appearance as a witness was entirely voluntary. Had he not testified his election not to do so could not have been considered by you in any manner in determining his guilt or innocence. But having chosen to testify the law requires that his testimony be judged and appraised by the same standards applied to the testimony of any other witness, giving consideration of course to his background, to his personality and to his natural interest in the outcome of this trial.

Now if you find that any witness has deliberately and wilfully lied with respect to any material fact in his testimony offered at this trial, you may follow either one of two courses. You may accept as much of the witness' testimony as you believe, or if you wish you can reject his entire testimony.

You recall during the trial the Court re-



## Judge's Charge to the Jury.

ceived a summary schedule showing the computation of the tax owed by the defendant in 1966 and 1967 according to the government's contentions. That schedule is now in evidence as Exhibit 24. The summaries are not in themselves independent proof. They are merely resumes or summaries of information or data as set forth in the testimony of the witnesses or documents that are exhibits in evidence. In short those summaries here are just mathematical computations based upon testimony and upon exhibits. The summary does not have any independent value as proof and can't be controlling that an item is unreported income just because it is so labelled on these summaries, or that the tax is due just because it is labelled so on this schedule. Because the schedule and summaries are no better than the underlying testimony and documentary evidence. The schedule is just a visual aid to help you understand the testimony and the documents in an orderly arrangement. The evidence is the testimony and the exhibits, and the summaries are no better than the testimony and the documents on which they are based.

It is for you to decide whether the summer-

## Judge's Charge to the Jury.

ies correctly present what was set forth in the testimony and the exhibits.

Therefore you are to give no greater consideration to these summaries than you would to the testimony and the exhibits.

Now before discussing the crimes charged here I want to remind you once more that an indictment is a mere accusation. It is not evidence of the truth of the charge made. And you are to draw no inference of guilt from the mere fact that the defendant has been indicted. An indictment simply means a defendant has been accused. The defendant has denied the charge made against him here by his plea of not guilty and by his testimony on the witness stand.

The defendant has no burden of proof whatever to sustain in this case. He is under no obligation to produce any witnesses or any evidence. He is presumed to be innocent and this presumption of innocence continues throughout the trial and during the deliberations of the jury. This presumption of innocence is overcome when, and only when, the government establishes the guilt of the defendant beyond a reasonable doubt.

Now what do I mean by "beyond a reasonable



## Judge's Charge to the Jury.

doubt"? As the phrase implies, a reasonable doubt is a doubt that is based upon reason. A reason which appears in the evidence or in the lack of evidence. It is not a vague, speculative imaginary doubt nor a doubt based upon what some juror might consider to be an unpleasant duty.

The government is not required to prove a defendant guilty beyond every possible doubt nor to a mathematical or absolute certainty because such method of proof is humanly impossible in human affairs.

You should review the evidence as you remember it, sift out what you believe; discuss it, analyze it; weigh and compare your views of the evidence with that of your fellow jurors. If that process produces a solemn belief or conviction in your mind, such that you would be willing to act upon without hesitation if this was an important matter of your own, then you may say that you have been convinced beyond a reasonable doubt.

On the other hand, if your mind is wavering or so uncertain that you would hesitate before acting if this was an important matter of your

## Judge's Charge to the Jury.

own, then you have not been convinced beyond a reasonable doubt and your verdict must be not guilty.

There are two counts in the indictment here. Count 1 and 2 charge that the defendant, Thomas Fahey, falsely, willfully and knowingly attempted to evade and defeat a large part of the income tax owed by him by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed false and fraudulent income tax returns which knowingly understated his income for the calendar years 1966 and 1967.

Now this indictment does not charge that the defendant paid no tax at all in each of the years in question. Rather the charge is that in each of those years the defendant had substantial taxable income over and above the income which he reported. That he knew that he had such income. That by not reporting this additional income the defendant attempted in each year to evade the tax due on that income and that in each year the attempt was not the result of a mistake or an oversight but was willful, which means that the defendant in each year was deliberately and



## Judge's Charge to the Jury.

purposely, with specific intent and motivation to evade the taxes due on the alleged additional income.

The law provides that any person who wilfully attempts in any manner to evade or defeat any tax or to evade or defeat the payment of any tax owed, shall be guilty of a crime.

Here you must consider each count in this indictment separately and determine as to each count whether the government has proved the guilt of the defendant beyond a reasonable doubt. I will send a copy of the indictment, along with all of the exhibits, into the jury room so that you will have them before you.

Now, in order to convict the defendant on the charge of income tax evasion the government must establish beyond a reasonable doubt each of the following three things. One, that a substantial amount of federal income tax was due and owing from the defendant for the calendar year in question.

Now there is no question that the defendant did receive income from the partnership during the taxable years which he did not report during each of the taxable years. But mere failure to report

## Judge's Charge to the Jury.

income which you receive is not in itself sufficient to establish the crimes charged here.

In order to convict the defendant, the government must prove in addition to the failure to report the income two other elements of the crime and as to those elements there is a sharp dispute.

2. The second element that the defendant made an attempt to evade or defeat the tax, and

3. That the defendant made the attempt knowingly and wilfully.

Now the government's contention as to the amount of income reported, as to the material which the government claims was received and as to the taxes which were in fact paid, and as to the taxes which were really due, are all set forth in Exhibit 24. That exhibit will be sent in to you and at this point I therefore do not intend to go into these figures.

Now the government is not required to prove the unreported income to a mathematical certainty. It is sufficient if the proof establishes that a substantial part of the tax liability was evaded.

What is a substantial part varies from



## Judge's Charge to the Jury.

case to case and depends on how the unreported income compares to the reported income and how large the tax would be on the additional income if it had been reported.

The second elements, the third, is that the defendant made an attempt to evade and defeat the tax. The attempt alleged in the indictment is the filing of false income tax returns.

An attempt is made when a false income tax return is knowingly filed. In order to file a false and fraudulent tax return a defendant must know that he had income in the years in question which was taxable and which he was required by law to report. And that he attempted to evade or defeat the tax on that amount, or a substantial part of it, by knowingly and purposely failing to state and report all of the income which he knew he had during the calendar year, and which he knew it was his duty to state and report in his return for the years in question.

Now the third element which you must determine, is whether the defendant's attempt to evade and defeat the tax was wilful.

If you find that the defendant did not state his income but that he did so without any

## Judge's Charge to the Jury.

wilfull attempt to evade taxes, you must acquit the defendant. The government must establish beyond a reasonable doubt that the defendant acted with a specific intent to conceal the other taxes known by him to be due.

Actual knowledge that the returns filed were false and subsequent filing in spite of that knowledge will show that he was acting wilfully.

A good faith misunderstanding of the defendant's liability for taxes is not an attempt to evade and defeat taxes.

There is no liability in errors or mistakes, or confusion or bad judgment if that represents the defendant's honest state of mind when the defendant acts in good faith in making his tax returns, if he honestly believes that they truly reflect his income in the respective years.

The government must prove more than mere negligence, stupidity or carelessness. It must prove beyond a reasonable doubt that the defendant knew what he was doing. That is in this case that he knew he had received more income than he was reporting on his income tax return, and that he knowingly and necessarily made a deliberate choice not to report all of his income for



## Judge's Charge to the Jury.

the purpose of evading the tax. That is that the defendant made his conscious purpose to not state his true income for the purpose and with the design to defraud the government of the true taxes due.

To sum it up in Counts 1 and 2, which you must consider separately, you must find beyond a reasonable doubt before you can convict the defendant (1) that there was a substantial amount of federal income tax due and owing from the defendant; (2) that the defendant attempted to evade or defeat that tax, and (3) that the defendant acted knowingly and intentionally and wilfully as I have defined those terms to you.

Now then as to Count which you are considering you find that the government has failed to prove beyond a reasonable doubt all three elements of the crime as I have given them to you, then you must acquit the defendant on that count.

On the other hand, if as to the count which you are considering you find that the government has proved beyond a reasonable doubt each of the three elements as I have given them to you, then you should return a verdict of guilt on that count.

2.  
Judge's Charge to the Jury.

Now you are instructed that the question of possible punishment of the defendant in the event of a conviction is no concern of yours and it should not in any sense enter into your, or influence your deliberations. The duty of imposing punishment in the event of a conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence.

When you retire to the jury room treat one another with consideration and respect as I know you will. If differences of opinion arise your discussion should be calm, dignified and intelligent. Your verdict must be based on the evidence and the law. The evidence which was presented in this case as you remember it and the law as I have given it to you in these instructions. You are each entitled to your own opinion. No juror should acquiesce in a verdict against his individual judgment.

Nevertheless I do point out that no one should enter a jury room with such pride of opinion that he would refuse to change his mind, no matter how sound or convincing the arguments



## Judge's Charge to the Jury.

of his fellow jurors. Discussion and deliberation are part of our democratic process and your deliberations should be approached in that spirit.

Talk out your differences. Each of you should in effect decide the case for himself or herself after thoroughly reviewing the evidence and frankly discussing it with your fellow jurors with an open mind and with a desire to reach a verdict. If you do that you will be acting in the true democratic process of the American jury system.

There are twelve of you on this jury. The alternates will be excused before you retire to your deliberations. Your verdict must be the unanimous verdict of all of you and it must represent an honest conclusion and I submit it to you now with the confidence that you will fully measure up to the oath which you took as members of the jury to decide the issues fairly and impartially and without fear or favor.

Now members of the jury, if you find that the government has failed to establish the guilt of the defendant beyond a reasonable doubt you will find him not guilty. If you find that the defendant has not violated the law you should

## Judge's Charge to the Jury.

not hesitate for any reason to render a verdict of not guilty.

On the other hand, if you find that the government has established the guilt of the defendant beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

When you retire for your deliberations you should elect a foreman or forelady from among your number to represent you to communicate with the Court and to announce your verdict. Your Foreman will render your oral verdict in open Court of guilty or not guilty on each of the counts.

Are there any exceptions? If so I will hear you at the Side Bar.

MR. WELCH: No, Your Honor.

MR. SCACCIA: No, Your Honor.

(At this point Joseph and Diane Scaramazzina were sworn to guard the Jury.)

THE CLERK: The alternate jurors are now excused from further consideration of this case and are to report to the grand jury room.

THE COURT: Thank you very much.

(Alternate jurors retire from the courtroom.)



Request from Jury for testimony of Boers (CPA) and Fahey (D)  
— Transcript not available.

THE CLERK: The jury may now retire to their deliberations.

THE COURT: Gather all the exhibits.

(The jury retired to the jury room to begin their deliberations.)

MR. SCACCIA: If Your Honor please, I just want to bring to the Court's attention the reverse of the indictment that we had, which indicates some language ---

THE COURT: You don't need to send them that. Send a clean copy of the indictment and make sure that you check all the exhibits.

MR. SCACCIA: Fine. All right.

(At this point this matter was in recess after which the following occurred.)

(In Chambers)

THE COURT: I have a note from the jury, Gentlemen. "We would like the transcript notes of Mr. Fahey's testimony last Friday. The Jury. Also Mr. Boer's testimony."

They apparently are under the illusion that transcripts exist of course, which they dont. More than that the Reporter who took them is not with us this morning.

MR. SCACCIA: That is correct.

Request from Jury for testimony of Boers (CPA) and Fahey (D)  
— Transcript not available.

THE COURT: He is in Syracuse. So I would just propose to tell them that there is no transcript. The notes are not transcribed.

MR. SCACCIA: I think that is fair.

THE COURT: Is that satisfactory?

MR. WALCH: Yes sir.

MR. SCACCIA: It states the fact.

THE COURT: I will just write on here "Sorry the testimony has not been transcribed." That is all I plan to write. I could tell them, but it would probably create delay, if they wished to have that testimony read I could have the Reporter here.

MR. SCACCIA: I leave it to your own good sense.

THE COURT: I leave it to you. You are representing the defendant. After all it should be their recollection.

MR. SCACCIA: Let's give them the note and see what the reaction is.

THE COURT: Mr. Marshal here is the note. I should it to Mr. Scaccia and Mr. Welch.

MR. SCACCIA: Let the record show I have seen it.

THE COURT: Let the record show that I



Request from Jury for testimony of Boers (CPA) and Fahey (D)

— Transcript not available.

wrote on the note. Just show it to the Jury and bring it back to me so I can include it as a Court exhibit.

(Whereupon at this point the conference in Chambers ended and the note was taken to the Jury.)

(The following occurred in Chambers at 11.23 a.m. with both attorneys present.)

THE COURT: As you probably observed I have a tape recorder out there for my own convenience in the event subsequent motions may be involved because where I have been sitting out of town, so I always have in my Chambers something in the nature of a transcript so I don't have to wait for the Reporter's transcript, if for somereason he may leave the job. So I have a tape recorder and Mr. Evans was running it. I don't know how good it is but they say could we have the tape played back.

MR. SCACCIA: I never heard of that before.

MR. WELCH: I think they are aware that notes could be reach to them. May I make this suggestions and Mr. Jordan can tell us whether it is possible. If Mr. Miller is in Syracuse is there any way that the two court reporters could change places?

Request from Jury for testimony of Boers (CPA) and Fahey (D)  
— Transcript not available.

THE COURT: Let's see what we can work out.  
You don't need this on the record, Bob.

(Discussion was held off the record which  
the Court Reporter was asked not to take.)

THE COURT: Back on the record. After  
discussion with counsel it is agreed I will call  
in the Jury and ask them whether they can pinpoint  
what they want and if they could then we could  
have the Reporter who took the testimony read it  
to us over the telephone from Syracuse. We all  
are aware Mr. Fahey testified a half hour on the  
first day and for about three hours or three and  
a half hours on the second day and it could take  
some time to read all of that testimony on direct  
and on cross examination. But if they want it  
they could have it.

MR. SCACCIA: Let me make one comment. I  
think we had Smith as the last witness. Whatever  
time he took would be subtracted.

THE COURT: Who is Mr. Boers?

MR. SCACCIA: He was from Ernst & Ernst.  
He was called as out first witness to lay the  
foundation for the documents.

THE COURT: All right. Let's go out in  
court.



Request from Jury for testimony of Boers (CPA) and Fahey (D)

— Transcript not available.

(Whereupon the conference in Chambers ended and the following was held in open court with all parties present.)

THE COURT: Bring in the jury.

(The Jury was returned to the courtroom.)

THE COURT: I have your note about wishing the testimony. As I told you during the charge it is your memory of the evidence that you have heard that you should rely on. And if you can't remember it perhaps some of your fellow jurors can to stimulate your memory.

Now we have a critical problem here. There are two court Reporters in this district and as you undoubtedly observed the one who took the notes is not the one here this morning. That Reporter, Mr. Miller, is on duty in Syracuse taking some testimony there today. You notice that I have a tape recorder. Someone asked about it. That is my own tape recorder. It is not the official version. It is something I have simply for my own use. I am a visiting Judge here. When I sit out of the District so I will have some record to take back to New York with me and to avoid the problem that we are having now I always have that to listen to. But it is

Request from Jury for testimony of Boers (CPA) and Fahey (D)

— Transcript not available.

far from a good record. And while it serves my purpose, where I often don't need a complete and detailed accurate transcript, I don't think it would adequately serve yours.

Now it would help here -- one other solution to this problem -- there are two solutions -- one is to delay until we get the Reporter who took the notes, or perhaps if you could tell me, pinpoint what you want with a little more focus on the part of the testimony you would like to hear, then I could simply have the Reporter in Syracuse dictate that to the Reporter here and read it to you that way.

You will recall that Mr. Fahey was on the stand Thursday afternoon and most of Friday morning and that his testimony was at some length and of course if you hear his testimony you have to hear it on both direct and cross examination.

So I would like you to go back and think about it and see whether you can pinpoint just what you want. If you can't let me know promptly and then we would just have to wait until we get the Reporter. Would your foreman send me a note telling me what you want to do. Is that all right, gentlemen?



Request from Jury for testimony of Boers (CPA) and Fahey (D)  
— Transcript not available.

MR. SCACCIA: Yes, Your Honor.

MR. WELCH: Yes, Your Honor.

THE COURT: All right.

(At this point the jury retired from the courtroom to continue their deliberations, at 11.35 a.m.)

THE COURT: Mr. Evans, will you mark the Jury's note as Court's Exhibit A.

(Jury's note marked as Court's Exhibit A in evidence.)

(The following discussion took place in the Court's Chambers at 11.55 a.m. with all counsel present.)

THE COURT: I had a note from the Jury. (Your Honor, the question we had concerning Mr. Fahey's and Mr. Boer's testimony has been resolved. Thank you. The Jury."

I will have the Clerk mark that as an exhibit.

(Second note from the Jury marked as Court's Exhibit B in evidence.)

(Whereupon the discussion in Chambers was concluded.)

(A luncheon recess was taken to await the jury's verdict.)

AFTERNOON SESSION

APPEARANCES: Same as morning session.

(The following proceedings took place in open Court with all parties present, including the defendant.)

THE COURT: The jury has reached a verdict. Bring in the jury.

(At 1.25 p.m. the jury was returned to the courtroom and seated in the jury box.)

THE CLERK: Ladies and Gentlemen of the Jury, have you agreed upon a verdict and if so how do you find and who shall say for you?

THE FOREMAN, JUROR NO. 10: Yes, Your Honor, we have agreed on a verdict. The Jury finds the defendant guilty on both counts.

THE CLERK: Harken to your verdict, ladies and gentlemen, you say you find the defendant guilty on both counts and so say you all?

THE JURORS: Yes. Yes.

MR. SCACCIA: May the jury be polled, please, Your Honor.

THE COURT: Poll the jury, Mr. Evans.

THE CLERK: Ladies and gentlemen as your names are called give your verdict. Barbara A. Ryan, as to Count 1?



## Verdict.

JUROR No. 1, BARBARA A. RYAN: Guilty.

THE CLERK: Count 2?

JUROR No. 1: Guilty.

THE CLERK: Arlene G. King? Count 1?

JUROR No. 2; Arlene G. King: Guilty.

THE CLERK: Count 2?

JUROR NO. 2: Guilty.

THE CLERK: Lena I. Moe, Count 1?

JUROR No. 3, LENA I. MOE: Guilty.

THE CLERK: Count 2?

JUROR No. 3: Guilty.

THE CLERK: Geraldine Kuppinger? Count 1?

JUROR No. 4, GERALDINE KUPPINGER: Guilty.

THE CLERK: As to Count 2?

JUROR No. 4: Guilty.

THE CLERK: Juror No. 5, Dorothy J. Magals,  
as to Count 1?

JUROR No. 5, DOROTHY J. MAGALS: Guilty.

THE CLERK: As to Count 2?

JUROR No. 5: Guilty.

THE CLERK: David A. Marks, as to Count 1?

JUROR No. 6, DAVID A. MARKS: Guilty.

THE CLERK: Count 2?

JUROR No. 6: Guilty.

THE CLERK: Josephine M. Meadows, Count 1?

## Verdict.

JUROR No. 7, JOSEPHINE M. MEADOWS: Guilty.

THE CLERK: As to Count 2?

JUROR No. 7: Guilty.

THE CLERK: Josephine A. Tripicchio, as to  
Count 1?

JUROR No. 8, JOSEPHINE A. TRIPICCHIO: Guilty.

THE CLERK: Count 2?

JUROR No. 8: Guilty.

THE CLERK: Janet E. Shaw, as to Count 1?

JUROR No. 9, JANET E. SHAW: Guilty.

THE CLERK: As to Count 2?

JUROR No. 9: Guilty.

THE CLERK: James A. Mason, as to Count 1?

JUROR No. 10, JAMES A. MASON: Guilty.

THE CLERK: As to Count 2?

JUROR No. 10: Guilty.

THE CLERK: Mary C. Triola, as to Count 1?

JUROR No. 11, MARY C. TRIOLA: Guilty.

THE CLERK: As to Count 2?

JUROR No. 11: Guilty.

THE CLERK: Gloria M. Thompson, as to Count  
No. 1?

JUROR No. 12, GLORIA M. THOMPSON: Guilty.

THE CLERK: Count 2?

JUROR No. 12: Guilty.



Motion to Set Aside Verdict.

THE CLERK: Unanimous verdict.

THE COURT: I want to thank you for the careful consideration I know that you gave to this case. I am sorry the sandwiches arrived a little later than expected. They are here now. I guess you may as well have your lunch right here. You are excused now until further notice. Thank you.

(At this point the Jury retired from the courtroom.)

THE COURT: All right, Mr. Scaccia.

MR. SCACCIA: May it please the Court, I respectfully move that the verdict of the jury be set aside. Notwithstanding the verdict of the Jury it would seem to me on all the evidence given its most favorable interpretation for the government, that there is an insufficiency of credible evidence to justify the verdict. That there is absolutely no proof of any affirmative acts constituting the kind of evidence we normally see in an evasion case. What we have seen is the consolidated records, ledger records, cash records, doing business in the usual manner with no attempt to conceal receipts. There hasn't been any proof in this case at all either by the government or

## Motion to Set Aside Verdict.

the defendant taken as a whole, together with the documentary evidence here as to the specific instructions by the exhibits except a carrying out to the letter the instructions given. Taking all the evidence in the case by both the prosecution and the defense it seems to me in the interest of justice, and I respectfully and sincerely urge Your Honor to direct a verdict of acquittal notwithstanding the jury's verdict.

THE COURT: Mr. Welch?

MR. WELCH: If Your Honor please, at this posture of the case the question of whether Mr. Fahey knew that this was reportable income has been resolved by the jury. So there is evidence of concealment from the auditor immediately after 1966, the auditor examined his 1967 return. At that point of time he knew the partnership revenue was reportable and he concealed it. There is further evidence by the accountant that he filed a refund and that evidence has to be considered as a fact that he had reportable income from the partnership itself.

At this time considering the evidence most favorable to the government, there is evidence of concealment of that income which he knew was



Motion Denied.

reportable income.

THE COURT: I deny the motion. I think there was sufficient evidence for the jury to find beyond a reasonable doubt that he had attempted to conceal from the government his taxes. Bear in mind that this was a specific item case and you don't get into the pattern of bank records and cash dealings and most things of that sort as one would expect to in a net worth case or a bank deposit case. This was one specific item, to wit solely from the partnership returns. And the other acts constitute sufficient evidence for the jury. Motion denied.

MR. SCACCIA: May I request bail be continued. The defendant is on his own recognizance. I don't believe there is any evidence but that he appeared in court at all times.

MR. WELCH: The government has no objection to that same bail.

THE COURT: The bail in it's present state is continued until ----

MR. WELCH: If Your Honor please <sup>we</sup> have agreed prior to trial, and I just re-established that we will substitute photostatic copies of the income tax returns.

Recess.

THE COURT: Sure. Any exhibit you can substitute a photostat for do so.

MR. WELCH: Thank you, Your Honor.

THE COURT: July 23rd, here in Auburn, for sentencing. Ten o'clock.

THE CLERK: Court stands in recess until nine thirty tomorrow morning.

(Whereupon the above-entitled matter was adjourned to July 23rd, 1974, at ten o'clock a.m.)

- - - - -



## Court Reporter's Certification.

REPORTER'S CERTIFICATION

I, F. ROBERT JORDAN, Official Court Reporter  
for the United States District Court in and for  
the Northern District of New York, do certify the  
foregoing to be a true and accurate transcription  
of the stenographic notes as taken by me during  
the aforesaid proceedings.

Official Court Reporter

Albany, N. Y.  
July 15, 1974.

WITNESSES

<u>NAME</u>	<u>DIR.</u>	<u>CROSS</u>	<u>R.D.</u>	<u>R.C.</u>	<u>V.D.</u>
RICHARD E. TELLAND, JR.	11				
LAURA E. POST	20	23			
JAMES E. CULOTTI	29				
NICHOLAS A. COURTESSIS	41	46			
WALKER MC KINNEY	52	60			
LAWRENCE E. KRENTKOWSKI	66				68
GERALD M. CULLEM	70	75			
ALAN DOERS	78	83	90		
MICHAEL P. FOODY	92	97	99	103	
THOMAS FAHEY	106	133	165		
BARRY J. GRAVANTE	171	182	189		



GOVERNMENT'S EXHIBITS

<u>NUMBER</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
1, 2		13
1-9		17
10, 11		20
3500	23	
12, 13		34
15-18		37
19		55
20-23		69
24		78
25		84
26	86	89
27	147	149
28	161	162

DEFENDANT'S EXHIBITS

<u>NUMBER</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
A	61	
B, D, C	80	81
E	108	112
F	109	112
G, H	187	189





Sentencing Proceedings, dated July 19, 1974.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----	-x
	:
UNITED STATES OF AMERICA,	:
	:
- against -	: 73-Cr-181
	:
THOMAS M. FAHEY,	:
	:
Defendant.	:
	:
-----	-x

The sentencing in the above-entitled matter was had pursuant to notice at the United States District Court held in and for the Northern District of New York, on Friday, July 19, 1974, at ten o'clock a.m. before HON. LLOYD F. MacMAHON, United States District Judge sitting by designation.

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Sentencing Proceedings, dated July 19, 1974.

A P P E A R A N C E S:

HON. JAMES M. SULLIVAN, Jr., United States Attorney for the Northern District of New York, Federal Building, Syracuse, New York, By: ARTHUR A. CHILINSKI, ESQ., Assistant U. S. Attorney, Of Counsel, appearing in behalf of the United States;

- and -

LOVE, BALDUCCI & SCACCIA, ESQS., Attorneys and Counsellors at Law, Wilson Building, Syracuse, New York, By: DANTE M. SCACCIA, ESQ., Of Counsel, appearing in behalf of the Defendant. The Defendant in person.

- - - - -

THE COURT: All right.

THE CLERK: United States of America against Thomas M. Fahey, 73 Cr 181.

MR. SCACCIA: Good morning.

THE COURT: Good morning.

MR. CHILINSKI: On July 10, 1974, the defendant, Thomas Fahey ---

MR. SCACCIA: Excuse me. June 10th.

MR. CHILINSKI: June 10th. I am sorry. After a two day trial for filing false income

## Statement by Defendant.

tax returns the defendant was found guilty by a jury in two counts. The government moves the imposition of sentence without recommendation.

MR. SCACCIA: I have nothing to say, Your Honor. I am confident the United States Probation Officer has filed a complete and detailed report and Your Honor is familiar with the proceedings in this case.

THE COURT: Mr. Fahey if you have anything to say for yourself before the Court pronounces sentence I will hear you.

THE DEFENDANT: Yes sir. I have had a good deal of opportunity to do much reflection on the evidence of the trial and going back to the time when my income tax returns were filed I felt at that time and still do feel that the only question is whether there was any unreportable income. In going over the results of the trial I think it is a simple matter of the jury just not understanding how money could be withdrawn from a partnership and not be subject to taxation. I think that was an understandable misunderstanding on the part of the jury. Partnership tax law I know now are extremely complex and I think it just went by the jury and I



## Statement by Defendant.

construe it and I would treat it today in the same way as I did when I filed the tax returns. I feel I did absolutely the correct thing.

Furthermore Mr. Scaccia has indicated -- I have not discussed it, but I understood Mr. Scaccia to say -- I spoke with him last night and asked what the possibilities of the legal proceedings are today. I asked and he<sup>said</sup> that it is within your total discretion that you acquit me regardless of what the jury found. He also said that it would be highly unusual.

THE COURT: I can't acquit you. You have been convicted by a jury. No matter what Mr. Scaccia told you, I doubt that he told you that.

MR. SCACCIA: I think he is confusing the terms.

THE COURT: Sure he is.

THE DEFENDANT: But it is within your total discretion to do anything as you see fit within the confines of the law.

Even though it is highly unusual I ask Your Honor to grant me that kind of consideration. It is a weighted thing to ask, I understand. But I firmly believe I did the proper thing and I believe it today. I have been

through a great deal with regard to the stain on my reputation, the expense of my defense and I know it is a good deal to ask, but I do beseech Your Honor to give consideration to this.

THE COURT: This was a serious crime.

You are a man who has had every opportunity and you have had sufficient education not to know but that what you filed was not a full report of your income, your pretentious language notwithstanding.

The defendant is sentenced to three years in prison on each of the counts one and two and fined ten thousand dollars on each of Counts one and 2, plus the costs of the prosecution on each of Counts 1 and 2. The prison sentences are to run concurrently but the fines are consecutive and cumulative. The defendant is to stand committed until the total fine of twenty thousand dollars is paid.

Execution of the prison sentences are suspended and the defendant is placed on probation for a period of three years subject to the standing probation order of this Court, and with the special condition that he pay all taxes and penalties and interest due and owing by him for



Sentence.

the years 1966 and 1967, within thirty days after determination of the amounts due by the Internal Revenue Service.

There is only one reason I am not sending you to prison and that is because you have a wife and five children. You deserve it. White collar crime is just as serious as the two men who went to jail this morning for burglary. They had no opportunities. You had every opportunity.

MR. SCACCIA: If Your Honor please I just have one question. Do I understand correctly that it is Your Honor's sentence payment is to be made within thirty days following determination by the I.R.S?

THE COURT: Yes. I want to advise you, Mr. Fahey that you have the right to appeal this conviction. If you wish to appeal it you must file a notice with the Clerk of the Court within ten days. If you have no funds to hire a lawyer, which is unlikely, the Court will appoint one free of charge. Do you understand?

THE DEFENDANT: Yes sir.

MR. SCACCIA: Your Honor I think we are prepared to file a notice of appeal and are pre-

pared to move speedily within the capabilities of the rules, and we don't anticipate asking for any enlargement of time.

I ask that the defendant be permitted to be released in his own recognizance, pending the appeal.

THE COURT: There is no need for that. I put him on probation.

MR. SCACCIA: Your Honor, the Marshal raises the question -- do I understand correctly if we promptly file notice of appeal and pursue the progression and filing of appeal that the sentence is not to be put into execution?

THE COURT: There is a committed fine. Nobody moved for a stay.

MR. SCACCIA: May I ask for a stay. Forgive me.

THE COURT: The execution of the sentence on the fine is suspended pending appeal.

MR. SCACCIA: Thank you.

- - - - -

(Whereupon the matter was closed.)



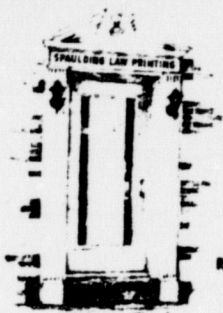
Court Reporter's Certification.

REPORTER'S CERTIFICATION

I, F. ROBERT JORDAN, Official Court Reporter  
for the United States District Court in and for the  
Northern District of New York, do certify the foregoing  
to be a true and accurate transcription of the steno-  
graphic minutes as taken by me during the aforesaid  
proceedings.

f. Robert Jordan  
Official Court Reporter

Albany, N. Y.  
July 20, 1974.



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## AFFIDAVIT OF SERVICE

RE: UNITED STATES OF AMERICA v. THOMAS M. FAHEY  
DOCKET NO. 74-2108 (formerly Docket No. 74-8285)

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:  
CITY OF SYRACUSE )

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of LOVE, BALDUCCI & SCACCIA, Attorneys for Appellant,

~~he~~he personally served three (3) copies of the printed [Record] ~~[Brief]~~  
~~[Appendix]~~ of the above-entitled case addressed to:

JAMES M. SULLIVAN, JR., ESQ.  
United States Attorney  
Northern District of New York  
Federal Bldg.  
Syracuse, N. Y. 13201

on October 24, 1974.

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*Everett J. Rea*  
.....

Everett J. Rea

Sworn to before me this 24th  
day of October , 1974.

*Ruth S. Moloughney*  
.....  
Commissioner of Deeds